Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PETER TERRITO AND STEVEN KENNEDY, AND AMERICAN MOTORISTS INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, AND LONDON MARKET INSURERS (as the insurers for the liability of James O'Donnell (deceased), Steven Kennedy, John Chantrey (deceased), and Peter Territo),

Petitioners,

v.

ALFRED ADAMS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act ("LHWCA") and the Supremacy Clause of the United States Constitution preempt the application of state tort law by precluding a damages claim brought by a shipworker covered by the LWHCA against his co-employees, where damages claims against co-workers are expressly disallowed by the LHWCA.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE

The Petitioners in this case are Peter Territo and Steven Kennedy, and American Motorists Insurance Company, Commercial Union Insurance Company, Highlands Insurance Company, The Travelers Indemnity Company and London Market Insurers (as the insurers for the liability of James O'Donnell (deceased), John Chantrey (deceased), Steven Kennedy, and Peter Territo). The Respondents in this case are 67 individuals:

Alfred Adams
Leslie D. Anderson
Lester C. Badeaux
Leroy L. Bonamour
William E. Boudreaux
Claude J. Brunet
John Byrd
Robert W. Campbell, Jr.
Junior J. Chaisson
Oscar J. Champagne
Patrick Clark
James A. Clement
Richard J. Cologne, Jr.
Walter Cologne
Charles P. Custard
Raymond A. Dantin
Bobby Davis, Sr.
Adam M. Decota
James W. Deshotel
George T. Disher
Riley D. Dufrene
Eugene Edwards
Joseph Faulk
Earlven Gauthe
Benny J. Giovingo
Floyd D. Glass
Stanley A. Gomez
Alvin Gonzales
Earl J. Guidry
Anthony Hebert
Joseph Hensley
Maxwell J. Hinrichs
James Houston, Jr.
Lewis T. Ishee
Kermit J. Kraemer, Jr.
Woodward Laird
Larry L. Landry, Sr.
Eric P. LeBlanc
Hyson M. LeBlanc
William Lombas, Jr.
James H. Magee
Randy E. Martinez
Lindsey J. Mazarac, Sr.
Walter B. Mitchell
Lovette D. Mize
Clarence J. Mollo
Robert C. Murphy
Maurice J. Ockmond, Jr.
Kirby Ordoyne
Angel Palenzuela

John R. Parker
Sam A. Pravata, Sr.
Kenneth G. Prestenbach
Roger H. Quave
James E. Reech
Alvin Robin
Alvin G. Robin
Andrew J. Stauder
Gary J. Stevens
Wallace Stevens
Glen R. Sticker
Oda K. Tate, Jr.
Stanley J. Thibodeaux
Robert L. Thomas, Sr.
Cleveland J. Thompson, Jr.
James J. Wainwright
Winston M. Whitten, Sr.

Other parties to this case are the heirs of Patrick Clark and Earlven Gauthe, who are: Deanna Clark, Wanda C. Crawford, and Bradley Michelli (for Clark), and Dorothy Gauthe, Paul Gauthe, Helen Cantrelle, Marion Fleming, and Anne Richwine (for Gauthe).

As required by Rule 29.6, the following corporate disclosures are made:

1. American Motorists Insurance Company:

   American Motorists Insurance Company is a 100%-owned subsidiary of Lumbermens Mutual Casualty Company, the parent company in the Kemper Insurance Companies. Lumbermens Mutual Casualty Company is owned by its policyholders. It does not have any stockholders.

2. Commercial Union Insurance Company:

   Commercial Union Insurance Company changed its name to One Beacon America Insurance Company. White Mountain Insurance Group, LTD, owns 10% or more of the corporation's stock.

3. Highlands Insurance Company:

Highlands Insurance Company is a wholly-owned subsidiary of Highlands Holding Company, Inc., which is owned by the Highlands Insurance Group, Inc. Highlands Insurance Group, Inc. is a publicly-traded corporation, but no publicly-held company owns 10% or more of its stock.

4. The Travelers Indemnity Company:

The Travelers Indemnity Company is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Insurance Group Inc., which is an indirect wholly-owned subsidiary of Citigroup, Inc., a publicly traded company. No publicly-held company owns 10% or more of the company's stock.

5. London Market Insurers:

The London Market insurance companies that subscribed to policies that are implicated by this litigation are:

Agrippina Versicherungs Aktiengesellschaft
British Traders Insurance Company Limited
Economic Insurance Company Limited
Excess Insurance Company Limited
Cornhill Insurance Company Limited
Insurance Company of North America
Liverpool Marine & General Insurance Company
London & Edinburgh Insurance Company Limited
Northern Maritime Insurance Company Limited
River Thames Insurance Company Limited

Sphere Drake
The Edinburgh Assurance Company
The Northern Maritime Insurance Company Limited
The Scottish Lion Insurance Company Limited
Threadneedle Insurance Company Limited
World Auxiliary Insurance Corporation Limited

No publicly-held company owns 10% or more of the London Market insurance companies whose policies are implicated by this litigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, comprised of several employees of a shipyard and their insurers, were held liable at trial on state law claims of negligence arising out of plaintiffs' exposure to asbestos at their workplace. Petitioners unsuccessfully argued to the trial court that the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act") preempted the plaintiffs' state law claims, due to an inconsistency between the LHWCA and the state law with respect to the availability of suit against co-workers for injuries longshore or harbor workers sustained on the job. The Louisiana Fifth Circuit Court of Appeal affirmed the judgment in favor of plaintiffs, explaining that an earlier Louisiana Supreme Court decision, *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction, Territo v. Poche*, 434 U.S. 803 (1977) bound it to hold that the LHWCA does not preempt such state law tort claims, despite the inconsistencies between the LHWCA and state law.

The Louisiana Supreme Court denied review in this case, notwithstanding the fact that the court of appeal's decision produced a direct conflict with the Alabama Supreme Court and the United States Courts of Appeals for the Fifth and Third Circuits on this issue of federal law, and is inconsistent with decisions issued by this Court both prior to and after *Poche*. Petitioners hereby petition for a writ of certiorari to the Louisiana Supreme Court to ensure a uniform application of this important federal law.

OPINIONS BELOW

The 71 workers covered by the LHWCA and subject to this Petition brought consolidated asbestos personal-injury

claims against the Petitioners. A jury rendered a verdict in favor of all of the Respondents. The trial court denied Petitioners' Motion for Directed Verdict and Alternative Motion for Judgment Notwithstanding the Verdict. Due to the complexity of the proceedings on appeal, the Louisiana Fifth Circuit Court of Appeal rendered a separate opinion on issues common to all plaintiffs, including the issue whether the LHWCA barred the state law claims against these Petitioners. The court of appeal affirmed the judgment.

The order of the trial court denying Petitioners' Motion for Directed Verdict and Alternative Motion for Judgment Notwithstanding the Verdict is unreported. [App. 160, 168.] The common issues opinion is reported at 784 So. 2d 46 (La. App. 5th Cir. 3/28/2001). [App. 1.] Separate opinions were rendered by the court of appeal in each case awarding damages.[1] The appellate court denied Applicants' Motion for Rehearing on the common issues opinion on April 26, 2001. [App. 186.] Petitioners filed timely petitions for writs of certiorari to the Louisiana Supreme Court with respect to all of the opinions involving all Respondents in this Petition, claiming error in the interpretation of the LHWCA, among other errors. The Louisiana Supreme Court's orders denying the Petitioners' petitions for writs of certiorari are not reported. [App. 150.] The unofficial citations for the denials are at: 2001-C-1534; 2001-C-1543; 2001-C-1544; 2001-C-1629; 2001-C-1853 (La. 12/14/01).

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[1] The appellate courts' "common issues" opinion also includes individual judgments for seven plaintiffs. The other separate opinions are not attached in the Appendix to this Petition, because they are concerned only with quantum.

JURISDICTION

The orders of the Louisiana Supreme Court denying Petitioners' petitions for writs of certiorari in the subject cases were entered on December 14, 2001. [App. 150.] No petition for rehearing is allowed under state law. Thus, the orders are final. This Court's jurisdiction rests on 28 U.S.C. § 1257(a), because the highest court of Louisiana applied its own state law and interpreted a federal statute in a manner that invalidates Petitioners' rights under that federal statute and violates the Supremacy Clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, clause 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. Art. VI, cl. 2.

The federal statute involved in this case is the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, specifically 33 U.S.C. § 933(i). That provision, entitled "Right to Compensation as Exclusive Remedy," provides:

> The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any person or persons in

the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

The entirety of section 933 is duplicated in the Appendix to this Petition. [App. 189.]

Also involved in the case are state statutes: Louisiana Revised Statutes §§ 23:1032 (as it existed before the 1976 amendments) and 23:1035.2. These statutes are reproduced in the Appendix as well. [App. 194 and 197.]

STATEMENT OF THE CASE

This case involves the interaction of two statutory schemes – the LHWCA and the worker's compensation laws of the state of Louisiana – in the context of multi-party tort litigation brought by shipyard workers exposed to asbestos on the job.

A. The Competing Federal And State Compensation Statutes.

Congress originally enacted the LHWCA in 1927, codifying a compromise between labor and industry. On the one hand, covered "longshoremen" would be guaranteed certain compensation benefits for injuries sustained in their employment (including injuries arising from asbestos exposure). On the other, the longshoremen's employers received immunity from tort suits. 33 U.S.C. § 905(a). In 1959, Congress extended the tort immunity to cover co-workers of aggrieved longshore and harbor workers. 33 U.S.C. § 933(i). That provision, entitled "Right to Compensation as Exclusive Remedy," provides:

The right to compensation or benefits under this chapter shall be the exclusive remedy to an

> employee when he is injured, or his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C.A. § 933(i) (West 2001). [App. 193.] The purpose of this amendment was to guarantee an employee the right to compensation if he is injured, while at the same time guaranteeing each employee protection from damages lawsuits should an employee negligently injure a co-worker. S. REP. NO. 86-428, at p. 2 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2134, 2135 (the "legislative history"). [App. 198, 201.]

Parallel to this federal statutory regime, Louisiana provides certain compensation rights and immunities to workers in its state, including workers covered by the LHWCA. Prior to 1976, Louisiana's workers' compensation statute enabled workers to receive guaranteed compensation in lieu of tort judgments from their employers for injuries occurring on the job, but a lapse in wording permitted injured workers to sue fellow workers in tort for damages for these same injuries even while receiving the guaranteed compensation under state law. In 1976, the Louisiana legislature closed that loophole by making co-workers, in addition to employers, expressly immune from such tort suits. Although co-workers prospectively gained some measure of protection by the amendment to the state compensation scheme, the Louisiana Supreme Court held that the amended statute did not apply to negligence claims against co-workers that accrued prior to 1976. *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976).

Applying this reasoning, Louisiana courts allow tort claims against co-workers alleging pre-1976 asbestos exposure. [App. 15-21.]

B. The Plaintiffs' Lawsuit.

Eight years ago, the 71 workers named Respondents to this Petition sued, among others, six of their co-workers for asbestos-related personal injuries allegedly incurred on the job. The Respondents represented virtually every craft necessary in ship construction at Avondale Shipyards, a shipbuilding company located on the banks of the Mississippi River near New Orleans. The defendants included James O'Donnell, Steven Kennedy, and John Chantrey, three former directors of the Avondale safety department, and Peter Territo, an employee who worked in the Avondale safety department (the "co-worker defendants"), and their insurers (collectively, "Petitioners"). It is undisputed in this case that the plaintiffs and the co-worker defendants are "employees" protected by the LHWCA.[2]

All of the plaintiffs asserted negligence causes of actions against the co-worker defendants. Petitioners repeatedly argued to the trial court that the LHWCA preempted the plaintiffs' ability to assert state law negligence claims against them, as it expressly prohibited such claims against a covered employee's co-workers. Before trial, Petitioners filed separate exceptions of no cause of action based on the

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[2] In latent-disease cases where injury is alleged to be caused by exposure to asbestos, the applicable law under the LHWCA is that in effect at the time the injury manifests, and not that in effect at the time of the asbestos exposure. *Castorina v. Lykes Brothers S.S. Co., Inc.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985). In this case, plaintiffs' injuries manifested in 1993 or later, and the LHWCA as of that date unquestionably covered all employee plaintiffs and defendants.

LHWCA or raised the co-employees' LHWCA immunity as an affirmative defense.[3] After trial, the Petitioners jointly filed a Motion for Directed Verdict and Alternative Motion for Judgment Notwithstanding the Verdict based upon the LHWCA and again raised the co-employees' LHWCA immunity as affirmative defenses.[4] The trial court denied the exceptions and motions. Specifically, the trial court's December 9, 1996 final judgment states: "The motion for judgment notwithstanding the verdict regarding the Longshore and Harbor Workers [sic] Compensation Act barring plaintiffs' claims filed by the executive officers of Avondale Shipyards and their insurers is DENIED." Record at p. S279. [App. 168.]

C. State Appellate Proceedings.

Petitioners suspensively appealed the judgments in the 67 cases subject to this Petition.[5] The appeals were consolidated and, pursuant to the appellate court's briefing order, issues common to all appeals were briefed separately as "common issues" in the initial brief submitted to the court. One of the common issues was "whether the plaintiffs' claims against the executive officer defendants are barred by the provisions of the Longshore and Harbor Workers'

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[3] *See, i.e.*, Record at pp. 435-42 (American Motorist's Exception), 561 (Highland's Exceptions), 871-74 (American Motorists' Answer and Affirmative Defenses), 960-65 (London Market Insurers' Answer and Affirmative Defenses), 1038-55 (Travelers' Exceptions, Answer, and Affirmative Defenses), 1065-82 (Commercial Union's Exceptions, Answer and Affirmative Defenses), and 1348-54 (American Motorists' Amended Exceptions).

[4] Record at pp. 6982-7009.

[5] Petitioners appealed from 72 of the consolidated cases. The judgment in the *Felix Albert* case is not included in this Petition because Mr. Albert was not an Avondale employee. Likewise, Petitioners did not ask for a review of four of the other individual appeals, in which the appellate court reversed the findings of liability.

Compensation Act." [App. 22.] Petitioners contended that the LHWCA conflicted with state tort law, because the LHWCA expressly precludes suits against co-employees such as Petitioners, whereas the workers' compensation law in Louisiana prior to 1976 (during which time the plaintiffs were exposed to asbestos at Avondale) permitted them. In light of this conflict, Petitioners argued, federal law must prevail.

On March 28, 2001, a *per curiam* opinion was rendered on the common issues. [App. 1.] The appellate court held that the LHWCA did not bar the plaintiffs' state law claims against Petitioners. The court found controlling *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), in which the Louisiana Supreme Court had held that the estate of a shipworker killed on land could assert a wrongful death claim under the state's tort law against the employer and certain co-workers. The *Poche* court reasoned that the LHWCA supplemented state workers' compensation laws, and therefore did not supplant tort remedies otherwise available to the shipworker's estate under state law. Following *Poche*, the appellate court in this case affirmed the judgment against Petitioners, finding that the plaintiffs were entitled to elect whether to pursue remedies under the LHWCA or state workers' compensation law. The court stated that because these plaintiffs did not elect to proceed under the federal LHWCA, each could "avail himself of the entire body of state compensation law, not merely the portions that do not conflict with the federal scheme." *Abadie*, 784 So. 2d 46, 67. [App. 26.] According to the reasoning of the appellate court, following *Poche*, the "body of state compensation law" included freestanding tort rights that were not precluded by state workers' compensation law.

A motion for reconsideration of the "common issues" opinion was filed on April 11, 2001, and denied on April 26, 2001. On May 25, May 29, June 6, and July 2, 2001, Petitioners filed petitions for writs of certiorari, claiming error, among other things, in the appellate court's interpretation of the LHWCA so as to permit tort suits against Petitioners. On December 14, 2001, the Louisiana Supreme Court denied Petitioners' petitions for writs of certiorari. [App. 150.] As a result of this decision, at the sole option of the plaintiff, state law overrides and negates otherwise applicable federally granted statutory immunity.

REASONS FOR GRANTING THE WRIT

The cornerstone of the appellate court's interpretation of the LHWCA in this case was the Louisiana Supreme Court's 1976 decision in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976). If the Louisiana Fifth Circuit Court of Appeal's judgment stands (as the Louisiana Supreme Court has allowed by denying Petitioners' writ petitions), injured longshore and harbor workers in Louisiana may continue to sue their fellow workers in tort despite the absolute immunity conferred upon such fellow workers by the United States Congress.

The holding of *Poche*, as reiterated by the Louisiana Fifth Circuit Court of Appeal in these consolidated cases, stands in direct conflict with decisions of other state supreme courts and federal courts of appeals. Intervention by this Court is necessary to ensure uniform application of this important federal statute and to vindicate the federally granted rights of thousands of maritime workers. Further, it is essential to bring the law in Louisiana into conformity with this Court's preemption jurisprudence.

I. The Louisiana Supreme Court's Decision Directly Conflicts With Decisions of the Alabama Supreme Court and the United States Courts of Appeals For the Third and Fifth Circuits.

The Alabama Supreme Court, in *Fillinger v. Foster*, 448 So.2d 321 (Ala.), *cert. denied,* 469 U.S. 872 (1984), properly held that because the LHWCA and the laws of Alabama conflicted on the issue of co-worker immunity, the federal LHWCA preempted the state law. Thus, on facts virtually identical to the facts in this case, the Alabama Supreme Court honored the federal immunity, and the suit against the Alabama co-employee under state law was dismissed. The Alabama decision correctly resolved the identical conflict between federal and state law that is presented in this case, and protected Alabama shipyard workers from tort liability, as required by federal law. Shipyard workers in the nearby state of Louisiana, however, are denied this federal benefit as a result of *Poche* and the decision below.

In *Fillinger*, a "shipfitter" was injured within the concurrent jurisdiction of the LHWCA and the Alabama State Workers' Compensation Act. As here, the plaintiff in *Fillinger* did not apply for LHWCA benefits. Rather, after applying for his state compensation benefits, the plaintiff brought suit against one of his co-employees who was alleged to have had specific responsibility for his safety. Like the Louisiana law at issue in this case, the Alabama Workers' Compensation Act did not immunize co-employees from liability in tort suits. The co-employee defendant argued that § 933(i) of the LHWCA barred the state tort claims, but the plaintiff responded, citing *Poche*, that state law remedies existed as concurrent to the LHWCA and could

be elected. The Alabama Supreme Court ruled in favor of the co-worker defendant and expressly rejected the holding of *Poche*. It held, in contrast, that that "the concurrent jurisdiction for pursuit of benefits under a state's workmen's compensation scheme does not include common law suits for damages against co-employees." *Fillinger*, 448 So.2d at 326. Where the LHWCA and the state law are in "serious conflict," as in *Fillinger* and in *Poche* with respect to the maintenance of co-employee suits, the LHWCA preempts the state law. *Id.*

The decision below likewise directly conflicts with a decision of the United States Court of Appeals for the Fifth Circuit, which specifically held that the LHWCA preempted state law on the question of whether individuals subject to the LHWCA could bring tort actions against their co-employees. *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993). In *Perron*, a worker on an offshore platform slipped and fell, allegedly due to oil negligently left on the platform by a co-worker. *Id.* at 1410. Perron sued the nominal employer of his co-worker on a theory of *respondeat superior*, arguing that Louisiana law permitted such a tort claim. Holding that Section 933(i) preempted any claims that might be made under Louisiana tort law against co-employees, *id.* at 1411-12, the court dismissed the *respondeat superior* suit.

A hypothetical illustrates how the direct conflict between the decision below and the *Perron* case could produce inconsistent results with respect to the very same underlying injury. Assume that a longshore worker is injured on a job site in Louisiana as a result of the negligence of two co-workers. The injured worker then files a claim of

negligence in state court against co-worker A, who resides in Louisiana, and a diversity suit in federal court against co-worker B, who resides in the neighboring state of Texas. Under the decision below, the worker's claim could proceed in state court against co-worker A, but would be barred under *Perron* against co-worker B.

The decision below also conflicts with *Peter v. Hess Oil*, 903 F.2d 935 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991), in which the court applied the analogous employer-immunity provision of the LHWCA to preclude a state tort suit. In *Hess Oil*, a longshoreman sustained injury by inhaling noxious fumes. The plaintiff filed a state negligence claim against Hess Oil based on its alleged failure to provide him with a safe place to work. Although Hess Oil was found to be the plaintiff's "borrowing employer" under the LHWCA, the Virgin Islands' legislature had abrogated the "borrowed servant" doctrine as a matter of state law just one month before Peter began his employment at Hess Oil. As a result of that abrogation, Peter argued that he was entitled to maintain a state negligence action against Hess Oil.

The Third Circuit concluded that "'a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of [the Supreme] Court.'" *Hess Oil.*, 903 F.2d at 951, *quoting Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953). The court recognized that if it allowed the negligence action against Hess Oil, the court would deprive Hess Oil of a federally guaranteed right of immunity granted under Section 905(a) of the LHWCA (the immunity provision for employers that parallels Section 933(i)'s immunity for co-workers). After considering the opinions in *Poche* and *Fillinger*, the Third Circuit sided with the

reasoning in *Fillinger* and held that the state law allowing state tort actions against "borrowing employers" must be preempted pursuant to the Supremacy Clause of the Constitution. *Id.* at 953. The court wrote:

> [T]he legislative history of the 1972 amendments [to the LHWCA] does make clear that Congress was motivated by two relevant considerations. *First, Congress intended that compensation, not tort damages, were to be the primary source of relief for workplace injuries for longshoremen against their employers*. Second, Congress believed that the incentives for tort litigation created by [prior] case law had done little to aid maritime workers or the public interest.

Hess Oil, 903 F.2d at 952 (emphasis added). With that, the court held that permitting a tort suit to proceed against an employer who had obtained LHWCA coverage for his employees would "obstruct the purposes of LHWCA by depriving maritime employers of their side of the *quid pro quo* [*i.e.* immunity granted in exchange for guaranteed compensation]." *Id.* at 953.

Fillinger, Perron and *Hess Oil* are directly at odds with the Louisiana Supreme Court's ruling in *Poche* and its continued application in the subject cases. Thus, employees covered by the LHWCA working in Louisiana, if sued in state court, are denied federal statutory immunities from suit that are recognized in other jurisdictions and in federal courts within Louisiana.

II. The Louisiana Supreme Court's Decision Is Inconsistent With Decisions Of This Court

A. The Decision Below Is Inconsistent With This Court's Interpretation of the LHWCA.

This Court considered the relationship between the LHWCA and state compensation schemes in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, *reh'g denied*, 448 U.S. 916 (1980). The case involved five employees of a shipbuilding company covered under the LHWCA. The injured workers filed for and received benefits under state compensation acts. The shipbuilding company argued that the state compensation action should be dismissed, arguing that the LHWCA provided the exclusive remedy to the injured worker. Although *Sun Ship* involved compensation claims and did not involve either a tort claim or the immunity provisions in 33 U.S.C. § 933(i), the basis for this Court's decision is inconsistent with the Louisiana courts' disposition of this case.

The issue presented in *Sun Ship* was whether the LHWCA preempted all state workers' compensation schemes, even where there was nothing in the payment of state compensation that was inconsistent with the LHWCA. The Court held that, at least in the absence of such inconsistency, Congress had not indicated any intent to foreclose the availability of state workers' compensation programs if the injured worker elected to pursue those programs. *Id.* at 722. The Court found no inconsistency in permitting workers to elect a more generous state workers' compensation remedy, explaining that Congress did not, in the LHWCA, provide employers with any rights that would

be obstructed if the injured workers elected to receive state compensation. *Id.* at 724-25.

Importantly for this case, the Supreme Court expressly noted in *Sun Ship* that it was not addressing cases where the state law compensation scheme operated to deny rights that were guaranteed by the LHWCA. Forecasting a possible case where application of an exclusivity clause in a state workers' compensation statute would foreclose the ability of an injured worker to receive the minimum guaranteed payments pursuant to the LHWCA, the Supreme Court suggested the appropriate remedy would be to preempt whatever portions of the state compensation scheme produced the conflict. *Id.* at 724 & n. 6. The immunity provided to co-workers in the LHWCA is no less a guarantee of the Act than are the minimum payments guaranteed to injured workers as discussed in *Sun Ship*, as was recognized by the court in *Fillinger v. Foster*, 448 So.2d 321, 325 (Ala. 1984). The decision below, by contrast, does violence to the foundation on which *Sun Ship* was decided.

B. The Decision Below Also Is Inconsistent With Numerous Other Decisions Of This Court Involving Standard Principles of Preemption.

The Court of Appeal's decision in this case rejects the approach in numerous cases decided by this Court, which illustrates that preemption should apply here. For instance, in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), the plaintiff complained that the State Commissioner of Labor's interpretation and application of various state laws denied the plaintiff her rights under the Federal National Labor Relations Act. Significantly, this Court held that the Commissioner's policy, which required the plaintiff to chose

between her rights under the state law or under the federal law, could not be reconciled with the federal statutory scheme premised on the centrality of the right to bargain collectively and the desirability of resolving contract disputes through arbitration. 512 U.S. at 115-17. As in *Livadas*, this case involves a state policy that has a "'direct tendency to frustrate the purpose of Congress' and, if not pre-empted, would 'defeat or handicap a valid national objective,'" and requires intervention by this Court. *See Livadas*, 512 U.S. at 116-117, *quoting Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 239 (1967).

"Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988), *quoting Free v. Bland*, 369 U.S. 663, 666 (1962). This Court in *Felder* held that "a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, . . . because the application of the state immunity law would thwart the congressional remedy, . . . which of course already provides certain immunities for state officials." *Felder*, 487 U.S. at 139, *quoting Martinez v. California*, 444 U.S. 277, 284 (1980). Thus, *Felder* presented an inconsistency between federal and state immunities precisely the opposite of that presented here. Applying the same preemption principles here, a federal law's immunity provision must prevail over a contrary state law. In other words, the application of Louisiana tort law, as applied by the Louisiana Supreme Court in *Poche* and in the decision below to allow LHWCA workers to sue co-workers in tort, must yield to the

LHWCA's grant of immunity to the co-workers, which directly conflicts with the state law result.

In another case addressing preemption, this Court overrode state law to enforce a federally granted immunity in *Howard v. Lyons*, 360 U.S. 593 (1959). The defendant in *Howard* was a commanding officer of a Naval shipyard, who was sued under state law for defamation after disseminating information to members of Congress for the state in which the shipyard was located. Because the federal officer was acting in the course of his official duty, the communication was absolutely privileged under federal law, precluding the tort suit brought under state law. This Court upheld the validity of the claim of absolute privilege, noting that such a privilege was "designed to promote the effective functioning of the Federal Government. No subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States." *Id.* at 597. Although "the effective functioning of the Federal Government" is not directly implicated by the immunity granted under the LHWCA, plainly the LHWCA immunity is one designed to promote the effective functioning of the federal compensation scheme for longshore and harbor workers.

Significantly, the court in *Hess Oil* applied the principles of preemption to find in favor of LHWCA preemption. *Hess Oil*, 903 F.2d 935, 953. Other maritime cases have also held that the LHWCA preempts inconsistent state law. In *Gates v. Shell Oil*, 812 F.2d 1509 (5th Cir. 1987), *cert. denied*, 494 U.S. 1017 (1990), a worker was injured on an oil platform covered by the Outer Continental Shelf Lands Act. Under federal law, Gates could sue Shell

Oil as a "third party." But under Louisiana law Shell Oil was a "statutory employer" and had a defense to the suit. The court found that because the LHWCA and Louisiana compensation law conflicted on the availability of affirmative defenses, the LHWCA prevailed. *Id.* at 1514. Applying the same reasoning, because the LHWCA and Louisiana compensation law concerning co-employee immunity conflict, the LHWCA again must prevail.

In *Poche*, the Louisiana Supreme Court circumvented the test for preemption as stated by this Court in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). In that case, this Court noted that:

> . . . even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"

Schneidewind, 485 U.S. at 300 (citations omitted). The requirements for preemption are met here, because it is impossible to comply with both the Louisiana law and the federal LHWCA, and Louisiana's law is an obstacle to the accomplishment of the full purposes and objectives of Congress in enacting section 933(i) of the LHWCA, as expressed in the legislative history. [App. 198.] Louisiana's preemption analysis produces an intolerable inconsistency with the law of this Court and other courts, and provides an analytical framework that inadequately safeguards the supremacy of federal law in Louisiana.

III. The Decision Below Produces Inconsistency In the Administration of an Important Federal Statute for Which A Uniform Federal Rule Is Necessary.

When federal programs that "'by their nature are and must be uniform in character throughout the Nation,'" formulation of controlling federal rules are necessary to preclude disparate treatment. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979), *quoting United States v. Yazell*, 382 U.S. 341, 354 (1966).[6]

When "application of state law would frustrate specific objectives of the federal program[ ] . . . , [the Court] must fashion special rules solicitous to those federal interests." *Kimbell Foods,* 440 U.S. at 728.[7] In the case now before the Court, the personal immunity granted to a longshore worker is at risk. That federal immunity should not and cannot be dissolved based upon the state in which the immune worker happens to be employed.

For example, in *Teamsters v. Lucas Flour Co.*, the Court held that § 301 of the Labor Management Relations Act of 1947 (at 29 U.S.C. § 185), mandated a uniform national rule to ensure uniform interpretation of collective-bargaining agreements, which by their nature, could be applied differently in each state. 369 U.S. 95, 103-104 (1962). "[W]e cannot but conclude that in enacting section 301

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[6] *See also Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *Illinois v. Milwaukee*, 406 U.S. 91, 105 n.6 (1972).

[7] *See also RFC v. Beaver County*, 328 U.S. 204 (1946); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595-97 (1973); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465-66 (1975); *Miree v. DeKalb County*, 433 U.S. 25, 31-32 (1977); *Robertson v. Wegmann*, 436 U.S. 584, 590-93 (1978); *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956).

Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104. Also, in *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, the plaintiff could not elect to proceed under state law when the relief sought under state law was not available under the federal National Labor Relations Act ("NLRA"). To allow otherwise would frustrate the congressional intent in enacting the constraints of the NLRA. 427 U.S. 132, 148 (1976).

Similarly, in *Western Union Telegraph Co. v. Boegli*, 251 U.S. 315 (1920), this Court considered whether a state could prosecute a telegraph company under state laws (assessing fines for delivery transgressions), after Congress legislatively brought telegraph companies within the control of the Act to Regulate Commerce and the Interstate Commerce Commission. This Court held that the state court erred in imposing a penalty on a telegraph company under the state law, because the statute so clearly established Congress' purpose to subject telegraph companies to a "uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate." *Id.* at 316. Likewise, Congress' purpose in amending the LHWCA to add section 933(i) was to establish a uniform national rule as to the immunity of LHWCA workers to tort suits brought by their injured co-workers. The section would be meaningless, as it is in Louisiana, if states could disregard it.

The decision below has resulted in the application of a federal statute – the LHWCA – that differs depending on whether a person covered by the statute is sued in Louisiana – or in Alabama, Texas or Pennsylvania. It is important for

this court to rectify the confusion, especially because of the volume of maritime injuries that occur in the coastal state of Louisiana. At this time, thousands of pre-1976 exposure asbestos-injury cases are pending in Louisiana state courts against one or more of the shipyard co-workers defendants sued in the cases subject to this Petition. And, given the long latency period of asbestosis, the decision below will affect countless other cases that have yet to be filed. It is therefore essential that this Court definitively resolve the question whether the LHWCA's immunity provision preempts these tort suits.

CONCLUSION

The decision below conflicts with decisions of other state supreme courts and federal courts of appeals. It is further inconsistent with several decisions of this Court, which address the LHWCA specifically and the doctrine of preemption generally. The federal immunity right that was displaced by the Louisiana Fifth Circuit Court of Appeal, applying controlling precedent of the Louisiana Supreme Court, is an important federal right integral to the LHWCA, which cannot be overridden by state law and for which uniform application among the states is essential. For the

foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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VERSUS	
METROPOLITAN LIFE INSURANCE COMPANY, ET AL.	

ADDRESSING INDIVIDUAL APPEALS

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WILLIAM BOUDREAUX	NOS. 00-CA-359, 00-CA-522, AND 00-CA-660
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ROGER H. QUAVE	NOS. 00-CA-427, 00-CA-456, AND 00-CA-645
ALVIN ROBIN	NOS. 00-CA-429, 00-CA-453, AND 00-CA-639

FIFTH CIRCUIT COURT OF APPEAL,

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA

NOS. 424-010, 433-992, 460-201, 444-648, 456-354,
436-503, 464-064, 426-017, 479-598 – DIVISION "J"

HONORABLE JACOB KARNO, JUDGE

MARCH 28, 2001

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REVERSED IN PART;
AFFIRMED IN PART

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In the early 1990's, over one thousand individual law suits were filed in the 24th Judicial District Court by plaintiffs who were exposed to asbestos over the previous decades. Numerous manufacturers and producers of asbestos products were named as defendants and the Executive Officers of plaintiffs' employers. These cases were cumulated and consolidated for trial under the direction of Judge Jacob Karno. On December 20, 1994, the trial court issued a trial plan setting four consolidated trials, broken down into groups of eight, nineteen, fifty-eight, and a final group of 323. Over the course of the next several months, suits in the first two groups were settled. The remaining suits involved exposure to asbestos at three major shipyards. In an Order dated July 18, 1995, the trial court separated the remaining cases according to the site of exposure. This Order set the trial of the suits involving exposure at Avondale Shipyards for September 18, 1995. The claims of 129 Avondale employees were tried before one jury. The resulting judgments from that trial form the basis of this appeal.

The first two weeks of trial were consumed by pre-trial motions and jury selection. Opening statements began on September 29, 1995, and the trial continued over the course of the next six months. At the conclusion of trial, 118 plaintiffs were awarded damages and eleven were not. Most defendants were found liable, while several were exonerated.

The non-settling defendants, Asbestos Corporation Limited (hereinafter referred to as ACL), and the Executive Officers of Avondale Shipyard, as well as their insurers (hereinafter referred to as the Avondale Interests), have perfected the instant appeals. Owens Corning had also appealed, but settled and dismissed their appeals with all but

two plaintiffs, Earlven Gauthe and Johnny Johnson. CBS Corporation, formerly known as Westinghouse Electric Corporation (hereinafter referred to as Westinghouse), settled and dismissed their appeals with all plaintiffs but Earlven Gauthe and Johnny Johnson after oral argument, but days before this opinion was rendered. In the interest of judicial economy and in attempt to simplify the issues, we have consolidated these matters for appeal purposes. At a hearing held by this Court, the appellants identified nineteen Common Issues. By Order dated May 20, 2000, these issues were ordered briefed, and on September 28, 2000 they were orally argued.

To facilitate the appeals regarding causation and quantum for individual plaintiffs, twelve groups of plaintiffs were established (Groups I-XII). The parties then briefed the issues specific to the ten plaintiffs comprising the Group I plaintiffs. Oral argument with respect to those Group I plaintiffs was held on October 26, 2000. However, immediately prior to oral argument this Court received notice from the U.S. Bankruptcy Court that Owens Corning had sought relief in that court. Because of the Stay Order issued by that court, this court has severed and stayed all appeals pertaining to Mr. Gauthe and Mr. Johnson, relative to all defendants and all issues therein. And because of the nature of the injuries received by Patrick Clark, we have decided to dispose of the appeal in his case by separate opinion.[1] Therefore, this opinion relates only to Group I plaintiffs Alfred Adams, Lester Badeaux, Leroy Bonamour, William Boudreaux, Oscar Champagne, Roger Quave, and Alvin Robin.

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[1] Patrick Clark was one of two plaintiffs with cancer.

The jury rendered a verdict in favor of each of these seven plaintiffs against ACL and six Avondale Executive Officers. In addition, the jury also found several other manufacturers and suppliers responsible either on a negligence and/or strict liability (unreasonably dangerous per se or failure to warn) theory. However, those parties either settled before trial or after judgment was rendered, and are not part of this appeal. Nonetheless, because of the virile share apportionment necessitated by the jury's findings, their liability or non-liability is an issue that has been raised by the defendants who have appealed.[2] Via a Judgment Notwithstanding the Verdict (JNOV), the trial judge reversed the jury's findings with respect to nine of those settling parties. Finally, included in those same JNOV rulings, the trial judge also increased most of the damage awards. Thus, in addition to the various arguments with respect to their own liability, ACL and the six Avondale Executive Officers also argue the incorrectness of the trial judge's grant of the JNOVs, and the correctness of the jury's finding of liability on the part of the settling defendants.

In an attempt to present this opinion in a logical and orderly fashion, we first turn to a discussion and resolution of the issues common to all of the defendants. We next turn to a general discussion of causation in asbestos cases, and the basic guidelines that we will apply in determining whether ACL and the settling defendants bear any responsibility to

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[2] Because each defendant initially filed a cross claim against each other and because this is a pre-comparative fault case, the amount actually owed by each viable defendant is reduced by the number of virile shares of those defendants who settled and have been found to be joint and solidary obligors with the remaining defendants.

each of these seven plaintiffs. Finally, we will discuss and resolve the specific arguments raised by each appellant.

COMMON ISSUE 1:

Whether the trial court erred in cumulating, transferring, and consolidating cases in forming the 129-plaintiff trial group?

Appellants argue that the trial court erred in cumulating, transferring, and consolidating cases in forming the 129 plaintiff trial group. The brief filed by ACL does not specifically address the issue of consolidation. Rather, ACL adopts the position of Westinghouse and the Avondale Interests with regard to this issue, and though Westinghouse has since settled with plaintiffs, we relate the arguments as they briefed them. Specifically, Westinghouse argues that the manner in which the trial group was formed violated its right to an individualized determination of the claims. First, Westinghouse contends that the aggregation of claims was prejudicial because it confused the jury, prevented a fair and impartial trial, and gave the plaintiffs an undue advantage. Westinghouse argues that the repetition of accusations against it validated the claims regardless of the merits of each individual claim, effectively eliminating plaintiffs' burdens of proof. Second, Westinghouse claims that individual issues, which could defeat a particular plaintiff's claim, were lost or minimized due to aggregation. It claims that the responses on the jury verdict forms indicate the jury was not able to identify individual products, their manner of use, and whether a particular plaintiff had been exposed to a particular product. Westinghouse contends that because of the numerous plaintiffs, witnesses, and exhibits it was impossible for the jury to make individual determinations whether its product was unreasonably dangerous, and

whether the product had substantially contributed to the injury of a particular plaintiff, on a plaintiff-specific, defendant- specific, or product-specific basis.

Westinghouse supports its contentions with the assertion that the plaintiffs lacked the requisite commonality for aggregation of their claims. While Westinghouse acknowledges that all of the 129 plaintiffs worked at Avondale for some period of time, it argues there were significant differences among plaintiffs with regard to their length of employment, their work site, the amount of exposure, their lifestyle factors, their medical histories, and alleged injuries. In sum, Westinghouse says that the few common issues were overshadowed by these individual differences, making cumulation inappropriate.

The Avondale Executive Officers also contend that consolidation denied them the opportunity to defend each claim individually, resulting in a denial of their rights to due process. The Avondale Executive Officers[3] named in these lawsuits are James O'Donnell, George Kelmell, John Chantrey, J.D. Roberts, Steven Kennedy, and Peter Territo.[4]

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[3] While referred to as Executive Officers, these six Avondale employees held various jobs during their tenure, some of which may not be a true "executive officer" in the corporate sense. However, the jurisprudence deciding co-employee liability has used the term "executive officer" in describing the co-employee. We, therefore, use that term throughout this opinion in reference to these six defendants.

[4] The Executive Officers were named in only 84 of the 129 lawsuits. The executive officer defendants were found to be liable to 72 plaintiffs. Plaintiffs and the Avondale Executive Officers stipulated that all of the Avondale defendant-employees were insured by American

These men were employees of Avondale, working in the safety department, at various times from 1948 until 1976. The claimants alleged that the Executive Officers were negligent in the manner in which asbestos-containing products were used at Avondale, and for failing to protect the workers against known hazards of asbestos. The Executive Officers counter with the argument that the only evidence presented specific to a plaintiff against a particular executive officer was that the defendant worked at Avondale at the same time as the plaintiff. The Executive Officers point out that during this time the government required the use of asbestos products on all Navy vessels. The officers also contend that during this time the asbestos manufacturers concealed the dangers of asbestos exposure, and the government standards for asbestos exposure were inadequate. They argue that the length of the trial, coupled with the magnitude of evidence from the numerous plaintiffs, defendants, and experts confused the jury, and resulted in the imposition of liability against executive officer defendants when there was inadequate evidence.

The plaintiffs[5] contend that the issue of the appropriateness of consolidation has already been addressed

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Motorists Insurance Company, Commercial Union Insurance Company, Highlands Insurance Company, and Travelers Insurance Company. Thus, although James O'Donnell, George Kelmell, and John Chantrey are deceased, and there has been no substitution of parties defendant, wherever we refer to the liability of an individual officer that reference means the respective insurer.

[5] One brief addressing the common issues was filed on behalf of all appellees except Earlven Gauthe and Johnnie Johnson. Mr. Gauthe and Mr. Johnson filed a separate brief.

by this court. They point out that the defendants in a separate flight of cases applied for Supervisory Writs from the Order that set the cases for trial.[6] In that Writ Application, those defendants argued that they would be unduly prejudiced by having to defend numerous diverse claims. This Court denied the Writ Application, holding that the consolidation was within the broad discretion of the trial court under LSA-C.C.P. art. 1561. The plaintiffs argue that the holding in this Writ Application constitutes the "law of the case," and this issue should not be re-litigated.

Plaintiffs further argue that while the defendants have claimed the consolidation resulted in prejudice and denial of due process, they have failed to support these allegations with concrete examples. The plaintiffs point out that the trial court, in ruling on Avondale's post-verdict Motion for Judgment Notwithstanding the Verdict, held there was sufficient evidence to support a finding of liability against the executive officer defendants. The plaintiffs contend that if the consolidation had resulted in jury confusion, as alleged by the defendants, then the jury would have awarded damages to all of the plaintiffs, which they did not do. Plaintiffs point to the jury interrogatories, which found some defendants liable to some plaintiffs, and other defendants not liable at all.

DISCUSSION:

While we are not satisfied that the "law of the case" doctrine is controlling in this situation, we are satisfied that

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[6] The writ plaintiffs refer to was filed by the defendant Todd Shipyard in another proceeding. See *Abadie v. Metropolitan Life Ins. Co.*, 95-C-181 (La. App. 5th Cir. 4/12/95).

LSA-C.C.P. art. 1561 supports the trial court's decision to consolidate these matters. That article provides:[7]

> A. When two or more separate actions are pending in the same court, the section or division of the court in which the first filed action is pending may order consolidation of the actions for trial after a contradictory hearing, and upon a finding that common issues of fact and law predominate.
>
> B. Consolidation shall not be ordered if it would do any of the following:
>
> (1) Cause jury confusion.
>
> (2) Prevent a fair and impartial trial.
>
> 3) Give one party an undue advantage.
>
> (4) Prejudice the rights of any party.

Westinghouse argues that the consolidation advantage for the plaintiffs was that the repetition of accusations against it validated the claims regardless of the merits of each individual claim, effectively eliminating plaintiffs'

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[7] At the time of trial, article 1561 read:

> When two or more separate suits involving a common issue of law or fact are pending in the same court, the court, at any time prior to trial, may order the consolidation of the suits for trial or may order a joint trial of any of the common issues.

The article was amended in 1997, and the amendment merely codified the jurisprudence holding that consolidation should not be ordered if it would result in confusion of the jury, prevent a fair trial, or prejudice any party.

burdens of proof. We disagree. Had the consolidation effectively eliminated plaintiffs' burdens of proof, the jury would have awarded damages to all 129 plaintiffs, which they did not do. The claims of eleven plaintiffs were rejected.

Likewise, the appellants' contention that the consolidation resulted in jury confusion is without merit. The jury completed interrogatories for each plaintiff. Each set of interrogatories listed each defendant. Not all defendants were found liable to all plaintiffs. The appellants have not shown with any specificity how the jury was confused by consolidation, nor have they shown how they were prejudiced, or that the trial was impartial.

Perhaps consolidation created an unduly burdensome situation for all parties, and perhaps on hindsight consolidating in this situation was not the best way to dispose of these cases. However, we find nothing in the record, nor have specific references in the record been pointed out to us, to show how any due process rights were violated or any prejudice or unfair advantage resulted. If any manifest error by the trial court or jury occurred because of consolidation, it will be corrected in this appeal.

COMMON ISSUE 2:

Whether by proceeding to judgment on less than all claims presented in each of the nine separate cases, the trial created non-appealable partial final judgment?

Westinghouse (and ACL by adoption) argues that in proceeding to judgment in less than all claims presented in each of the nine separate cases from which the 129 plaintiffs were drawn, the trial court created non- appealable partial final judgments. Westinghouse explains that the judgments

before this Court at this time are not appealable until all the claims in each case are adjudicated. This issue was not briefed by the Avondale Interests.

The plaintiffs counter with the assertion that the 129 cases adjudicated in this trial were completely resolved. We agree. The cumulation of these cases for trial did not destroy the independence of each case. A separate judgment was entered in each case adjudicating each plaintiff's claim against each defendant. An appeal may be taken from a final judgment. LSA-C.C.P. art. 2083. "A judgment that determines the merits in whole or part is a final judgment." LSA-C.C.P. art. 1841. There were no partial final judgments rendered in the record before us. A partial final judgment is defined in LSA-C.C.P. art. 1915 as "any order or decision which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties." There are no parties in any of the cases before us who have unresolved claims pending. The jury rendered findings and the trial judge issued judgments determining the merits of the claims. The judgments rendered are appealable.

COMMON ISSUE 3:

Whether the causes of actions did not accrue until after October 1, 1976, and thus the claims against the executive officer defendants are barred by the Louisiana worker's compensation statutory immunity?

Avondale Interests argue that the plaintiffs are prohibited from suing them in tort because of workers' compensation statutory tort immunity. In support of their position, the Avondale Interests cite *Cole v. Celotex,* 599 So.2d 1058 (La. 1992), and cases cited therein, which, they

argue, hold that a plaintiff's cause of action does not accrue until he has "contracted" his disease.

Louisiana Workers' Compensation Law, specifically LSA-R.S. 23:1032, was amended, effective Oct. 1, 1976, to specifically prohibit negligence suits against Executive Officers for work-related injuries. The Avondale Interests argue that the plaintiffs' causes of action accrued after October 1, 1976, and thus they are prohibited from suing the Avondale Executive Officers in tort for damages caused by negligence. A determination of when plaintiffs' cause of action accrued affects whether pre-1976 law or post-1976 law applies. Defendants argue that the evidence shows that plaintiffs did not contract their asbestosis and cancers until well after October 1, 1976, and thus the plaintiffs' causes of action accrued after that date, and therefore, the Executive Officers are immune from tort liability. They also argue that mere exposure to asbestos is not enough to establish a cause of action under the traditional tort principles.

Plaintiffs also cite *Cole* for their position that plaintiffs' causes of action against the Executive Officers accrued at the time of their tortious exposures to asbestos-containing products, most of which occurred prior to October 1, 1976, and therefore, their causes of action arose under pre-amendment R.S. 23:1032, which allows plaintiffs to sue the Avondale Executive Officers in tort for negligence. Plaintiffs argue that *Cole* clearly changed the methodology for determining what law applies in long-latency tort cases.

The Louisiana Supreme Court in *Cole* considered the application of the new Comparative Fault Law[8] to long-

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[8] Acts 1979, no. 431, effective on August 1, 1980.

latency tort cases where the plaintiffs' tortious exposures took place prior to 1980, but the diseases manifested and the suits were filed after the enactment of comparative fault. The *Cole* court expressly declined to establish new criteria for determining when a plaintiff's tort cause of action accrued. The *Cole* court followed traditional tort law, which holds that a plaintiff's cause of action accrues when a party has a right to sue. Three elements are required: fault, causation, and damages. The court recognized that "Louisiana is generous in its conception of damages, the slightest being sufficient to support an action." *Cole, supra,* footnote 15. In his concurrence, Justice Dennis recognized that a cause of action may accrue before a plaintiff sustains *all* of his damages.

Though *Cole*'s holding did not directly address the applicability of R.S. 23:1032, it did discuss that statute in the context of long-latency diseases. The *Cole* court recognized that it was well-settled that the 1976 amendment to R.S. 23:1032 could not be retroactively applied to divest parties whose causes of action *accrued* before the amendment was enacted, citing, among other cases, *Faciane v. Southern Shipbuilding Corp.,* 446 So.2d 770 (La. App. 4th Cir. 1984), which outlines the "contraction test" for determining when a plaintiff's cause of action accrues.

Cole discussed the inherent difficulties in applying the "contraction" test, noting that in asbestosis cases the "lengthy latency period renders efforts to pinpoint the date on which the disease was contracted virtually impossible, medically

and legally."[9] The Supreme Court left for another day, however, "resolution of the continued viability of the contraction theory in the context in which it arose" (*Cole,* 599 So.2d 1058, note 54), as neither applicant contested the Third Circuit's factual findings nor its application of the "contraction" test for the cause of action's accrual. *Cole,* therefore, did *not* go so far as to formulate a new "significant exposures" test, in long-latency cases, to determine *when* a plaintiff's cause of action accrues. What *Cole* did, in the context of R.S. 23:1032, was open the door to question whether the "significant exposures" test *should* be used, rather than the traditional tort models such as the "contraction" test, to determine the application of all laws in a long-latency disease case.

Since the Louisiana Supreme Court's ruling in *Cole,* many Louisiana appellate cases have discussed the effects of *Cole*'s holding on the application of other laws (such as workers' compensation, products liability, prescription) in long-latency tort cases. These courts found that *Cole* called into question the viability of the contraction theory as a method for determining the accrual of a cause of action in long-latency disease cases.

The Supreme Court did not revisit this specific *Cole* issue again until *Walls v. American Optical Corp.,* 98-0455 (La. 9/8/99), 740 So.2d 1262. There, the court considered the

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[9] However "herculean" the task of determining the date of contraction of asbestos-related diseases, the jury managed it in *Cole,* as the Third Circuit noted and explicitly affirmed. Likewise, so did the court in *Schouest v. Stipelcovich,* 490 So.2d 294 (La. App. 5th Cir. 1986).

application of R.S. 23:1032 to wrongful death cases when the decedent's occupational exposures occurred entirely before the statute was amended, but the death did not occur until years after the amendment's effective date. The *Walls* plaintiffs asked the court to abandon the traditional approach to determining the applicable law in a tort suit and employ instead the "tortious exposures" test articulated in *Cole*. The plaintiffs interpreted *Cole* to require all long-latency occupational lung disease cases to be governed by the law in effect on the date the victim was *exposed* to the disease-causing agent. The Supreme Court disagreed with such an expansive reading of *Cole*. The court found that the wrongful death plaintiffs' cause of action did not arise (accrue) until the decedent's death, and therefore, R.S. 23:1032 as amended applied to plaintiffs' cause of action, barring their wrongful death suits against Executive Officers:

> The survival and wrongful death actions are totally separate and distinct causes of action that arise at different times and allow recovery of completely different damages. *Guidry* [*v. Theriot*], 377 So.2d 319 [(La. 1970)]. *Cole established the "exposure theory" for determining the applicable law within the context of the direct tort action and survival action.* "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Landgraf* [*v. USI Film Products*], 511 U.S. [244] at 265, 114 S.Ct. [1483] at 1497, 128 L.Ed.2d [229] at 252 [(1994)]. Therefore, *Cole*'s rationale cannot apply to the instant case involving a wholly distinct cause of action for wrongful death.

Walls, 740 So.2d at 1273 (Emphasis added.) The emphasized language in the above quote strongly suggests the viability of the "exposure theory" in a direct tort action.

Borrowing from the rationale of *Cole,* the "significant exposure" test for determining when a cause of action accrues in a long-latency disease is "when pre-act exposures are significant AND such exposures later result in the manifestation of damages." *Cole, supra* at p. 1066. We hold that tortious exposures are significant when asbestos dust has so damaged the body that the fibrogenic effects of its inhalation will progress independently of further exposure. This application of the "significant exposure" test is not materially different from the application of the "contraction" test in *Faciane v. Southern Shipbuilding Corp., supra.* In *Faciane* the Fourth Circuit stated:

> ... in the unique circumstances presented by cases of cumulative diseases such as silicosis, it is the contraction of the disease which creates a cause of action and not the later manifestation of the consequences of that disease.
>
> * * * * *
>
> ... once silica dust has so damaged and maimed the body that the fibrogenic effects of silica inhalation will progress independent of further exposure, a disease has been contracted.

Similarly to the Fourth Circuit in *Faciane,* we hold that in order to establish when their cause of action accrued, plaintiffs will have to show more than mere exposure to asbestos. Plaintiffs will have to present evidence that the exposures were significant, and that the asbestos exposure started the disease process in their lungs. While the plaintiffs

cannot document each and every exposure and the resulting consequence, expert testimony based on medical and scientific studies can establish whether the pre 1976 exposures were significant enough to produce injury.

Each expert medical doctor in this case testified that he used several criteria to diagnose an asbestos-related disease. Each doctor required a history of exposure to asbestos, and a latency period before the manifestation of symptoms. The doctors' opinion on what constituted significant exposure, however, varied.

CONCLUSION

Cole v. Celotex and *Walls v. American Optical* have validated the use of "significant exposures" test for determining the applicable law in a long-latency tort cause of action. The law in effect at the time of the tortious exposures will apply if the evidence proves that the exposures were *significant* AND *resulted in the later manifestation of damages*. There is no bright line test to establish significant exposure in cases involving latent diseases. However, expert medical testimony establishing that the exposure was sufficient enough to begin the disease process is acceptable to fix the time period for accrual of the cause of action.

Plaintiffs have the burden to demonstrate by a preponderance of the evidence that damages were caused by pre-1976 significant exposures in order to have a cause of action against the Avondale Executive Officers. The courts must determine if a plaintiff has borne his burden of proof on a case by case basis. In the group of seven plaintiffs that we consider today, the record contains sufficient references to pre-1976 asbestos exposures through evidence of their work history and the testimony of medical experts describing the

beginning of the disease process to allow each to meet his burden of proof.

COMMON ISSUE 4:

Whether the plaintiffs' claims against the executive officer defendants are barred by the provisions of the Longshoreman and Harbor Worker's Compensation Act?

Avondale Executives argue that the LHWCA is the plaintiffs' sole remedy against Avondale and any Avondale employee. Under the LHWCA plaintiffs are prohibited from suing co-employees (Executive Officers) in tort. Plaintiffs contend, citing *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), that the LHWCA and the State Workers' Compensation scheme exist as concurrent remedies, and that the existence of the LHWCA does not preclude plaintiffs from electing to pursue their remedies under State law.

ANALYSIS

Concurrent Remedies

In 1972, Congress extended the LHWCA to provide coverage to traditional maritime workers who worked landward beyond the shoreline of the navigable waters of the United States. In 1976, the Louisiana Supreme Court addressed whether LHWCA was the exclusive remedy for a shipyard worker in *Poche v. Avondale Shipyards, Inc.* In *Poche,* Curtis Poche, Sr. was engaged in new ship construction in a shipyard area located entirely over land when a scaffold fell, causing him to be fatally injured. His widow and children filed a third-party negligence action for wrongful death under state law against Avondale Shipyards, Inc., and certain named Executive Officers of Avondale

Shipyards pursuant to LSA-R.S. 23:1101. The defendant Executive Officers filed Exceptions of No Right and No Cause of Action, claiming that the benefits afforded by the LHWCA were available to plaintiffs, and thus excluded all rights, remedies, and benefits otherwise provided by the Louisiana Workers' Compensation Act.

The Court found, after reviewing the cases decided by the United States Supreme Court, that state compensation laws could be constitutionally applied concurrently with the federal LHWCA compensation system. *Poche*, 339 So.2d at 1217. Further, if a plaintiff chose to proceed under state law, he had the right to the benefits of the entire body of state compensation law, even if the state scheme provided benefits in addition to or in conflict with the federal scheme. In *Poche*, this meant that Poche's widow could sue the Avondale Executive Officers in tort, a remedy available in state law against executive co-workers prior to the 1976 amendment of R.S. 23:1032, but not available under the federal scheme.

After *Poche*, the United States Supreme Court in *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980), acknowledged that State compensation law and the LHWCA provide concurrent remedies. In *Sun Ship*, the Court held that the extension of federal jurisdiction landward beyond the shoreline of the navigable waters under the 1972 amendments of the LHWCA supplements, rather than supplants, state compensation law. The Court further held that the 1972 amendments cannot fairly be understood as preempting workers' state remedies.

The Louisiana Supreme Court revisited the *Poche* issue in *Beverly v. Action Marine Services, Inc.*, 433 So.2d 139 (La. 1983). In *Beverly*, the plaintiffs brought suit to recover

benefits under the Louisiana Workers' Compensation Act for the death of their son. The defendants filed peremptory exceptions, alleging that the plaintiffs' exclusive remedy was under LHWCA. The *Beverly* court acknowledged the *Sun Ship* case, stating that concurrent remedies continued to exist under state law and federal law, that the amended LHWCA was not exclusive, and that state regulation of worker injuries is even more clearly appropriate ashore than it is upon navigable waters. *Beverly,* 433 So.2d at 141. Six years later, the Louisiana Supreme Court, in *Logan v. Louisiana Dock Company, Inc.,* 541 So.2d 182 (La. 1989), reaffirmed the existence of concurrent state and federal compensation remedies.

Avondale Interests argue that *Poche* does not apply because the plaintiffs did not present evidence that they worked exclusively on land, citing two cases, *Roberts v. Avondale Shipyards, Inc.,* 537 So.2d 808 (La. App. 5th Cir. 1989), and *Wixom v. Travelers Ins. Co.,* 357 So.2d 1343 (La. App. 4th Cir. 1978), for this argument. We find *Roberts* is distinguishable because it involved a plaintiff who pursued and received LHWCA benefits prior to suing in tort. *Wixom* is also distinguishable. In *Wixom* the court found that the LWHCA remained the exclusive remedy for plaintiff Wixom's injuries, because he was a traditional maritime worker injured while working entirely on a navigable waterway, not in the land-based "twilight zone" of concurrent state and federal coverage.

Avondale Interests argues that the plaintiffs' exclusive remedy is under the LHWCA because of the preemptive language of LSA-R.S. 23:1035.2 of the Louisiana Workers' Compensation Act. LSA-R.S. 23:1035.2 was added by Acts

1989, No. 454 § 2, and became effective January 1, 1990. This statute reads as follows:

> No compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Worker's Compensation Act, or any of its extensions, or the Jones Act.

LSA-R.S. 23:1035.2 now divests plaintiffs of the concurrent state and federal remedies. *Smith v. Gretna Mach. and Iron Works,* 94-369 (La. App. 5th Cir. 11/16/94), 646 So.2d 1096, 1097.

Avondale's argument, that under the language of R.S. 23:1035.2, the plaintiffs' claims fall exclusively under LHWCA, is without merit. Prior to the enactment of R.S. 23:1035.2, a worker who was covered by both the Louisiana Workers' Compensation Act and the LHWCA was allowed to choose between the two schemes. *Sun Ship, supra; Logan v. Louisiana Dock., supra.* Status for purposes of federal coverage does not bar recovery under State law. *Beverly v. Action Marine Services, Inc., supra,* citing *Hahn v. Ross Island Sand & Gravel Co.,* 358 U.S. 272, 79 S.Ct. 266, 3 L.Ed.2d 292 (1959).

The fact that plaintiffs may be classified as longshoremen does not preclude them from bringing a claim in tort under *Poche.* The LHWCA before 1972 had no application to injuries occurring on land, and state compensation schemes constituted the sole remedy available even for a traditional maritime worker working on land. If a particular plaintiff's claim accrued or became vested before 1972, then state law applies. If the plaintiff's claim accrued

after 1972, then under *Poche,* up to the effective date of La. R.S. 23:1035.2 (January 1, 1990), the plaintiffs have concurrent state and federal remedies.

The Avondale defendants cite *Cobb v. Sipco Services & Marine, Inc.,* 1997 WL 159491 (E.D.La.), which addressed the issue of whether the exclusive remedy provision of LHWCA affects the availability of state tort relief for a plaintiff injured in a shipyard. Cobb was injured in *1994* and sued his borrowing employer for punitive damages under LSA-C.C. art. 2315.3, after receiving LHWCA compensation. The trial court held that this state tort claim, because it involved a remedy outside the state compensation scheme (punitive damages), directly conflicted with the LHWCA and, therefore, federal preemption applied. This cause of action clearly arose after the 1976 amendment to R.S. 23:1032, and the 1990 amendment to R.S. 23:1101. Moreover, we find that *Cobb* is distinguishable because the plaintiffs in *Cobb* sought LHWCA recovery first.

CONCLUSION

We find that the Louisiana Supreme Court case of *Poche v. Avondale Shipyards, Inc.,* 339 So.2d 1212 (La.1976), controls for the pre 1976-injuries. It holds that LHWCA and state workers' compensation schemes provide concurrent remedies for these maritime workers who work over land; plaintiffs may choose to proceed under either scheme. Further, if a plaintiff chooses to proceed under the state compensation scheme and makes no claim under LHWCA, he may avail himself of the entire body of state compensation law, not merely the portions that do not conflict with the federal scheme. Thus, the plaintiffs' choice to proceed under state law allows them to sue the Executive

Officers in tort, under pre-amendment R.S. 23:1032 and 23:1101, a remedy not available under the LHWCA.

COMMON ISSUE 5:

Whether the trial court improperly limited defendants' access to evidence and use of expert witnesses regarding medical issues?

ACL and the Avondale Interests argue that the trial court erred by limiting them to one Independent Medical Examination (IME) of each plaintiff and to one examination of any tissue samples by a pathologist. They argue that this ruling limited them to a single medical defense and impaired their ability to present certain scientific and medical defenses.

On September 21, 1992, the trial court issued Case Management Order No. 1. Subsection 8(H) states in pertinent part:

> The defendants shall have, upon request and at their own expense, an independent medical examination conducted of each plaintiff. Additional medical examinations will require a court order. However, upon leave of Court, a plaintiff may be re-examined by any defendant if the original examination was conducted more than one year prior to the trial date or there has been a change in diagnosis by plaintiff's treating physicians and/or expert witnesses. Reports of IMEs shall be obtained and provided immediately to counsel for plaintiffs.

The plaintiffs argue that the Case Management Order was produced by a joint effort of the parties and was not

objected to by the defendants. Writs were not taken on the issue.

The general rule regarding medical examination of a party is governed by LSA-C.C.P. art. 1464, which states as follows:

> When the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control, except as provided by law ... The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by who it is to be made. *White v. State Farm Mut. Auto. Ins. Co.,* 95-551 (La. App. 3rd Cir. 7/17/96), 680 So.2d 1.

The defendants claim that they were prejudiced by the trial court's ruling because they were not allowed to produce expert witness testimony concerning the degree of danger presented by the different types of asbestos. Also, the defendants allege that they were prejudiced by the fact that each plaintiff was allowed to produce his/her treating physician to testify at trial while they were limited to a single medical witness regarding each plaintiff.

The defendants' allegations appear to suggest that the trial court limited their ability to call expert witnesses, but the Case Management Order in no way curtails this right. In

fact, the Case Management Order provides the defendants with the ability to petition the trial court for additional medical examinations if necessary.

The trial court is afforded wide discretion in granting physical examination of parties litigant and in setting the guidelines for such examinations. *Walker v. Marcev,* 427 So.2d 678 (La. App. 4th Cir. 1983); *writ denied,* 433 So.2d 182 (La. 1983). The court may subject the examination to reasonable restrictions or conditions, if special circumstances are shown. *Id.* at 680.

The enormity and complexity of the issues and the number of plaintiffs in this case warranted reasonable restrictions on discovery. Special circumstances were shown and the parties agreed on the Case Management Order. The defendants were not prejudiced by this ruling because their ability to call expert witnesses was not limited as they claim. The only limitation was on the number of IMEs allowed, and the trial court made provisions for additional IMEs if warranted. The trial court did not abuse its discretion in this matter. This argument has no merit.

COMMON ISSUE 6:

Whether the jury panel was unfairly influenced by plaintiffs' counsel's improper statements, comments, arguments and actions?

This issue was not specifically briefed by the parties, and therefore is considered abandoned. Uniform Rules of Louisiana Courts of Appeal, 2-12.4.

COMMON ISSUE 7:

Whether the trial court erred in its allocation of peremptory challenges?

Westinghouse argues that the trial court erred in its allocation of peremptory challenges. ACL has adopted Westinghouse's position on this issue. In support of its position ACL cites LSA-C.C.P. art. 1764(C), which allows an equal number of peremptory challenges to each side. ACL takes issue with the trial court's determination that there were only two sides to this case, claiming it was error to force ACL to share its peremptory challenges with all other defendants, including some who pursued third party demands against other defendants.

The plaintiffs contend that there were only two sides in this case and nothing was presented to the jury that portrayed the defendants as adverse. They further point out that challenges to the impanelment or composition of the jury in a civil case must be resolved by supervisory writ and cannot be raised on appeal after the trial. Pretermitting the issue of whether defendants waived their objections to the impanelment of the jury, we see no error in the trial court's allocation of peremptory challenges.

LSA-C.C.P. art. 1764 provides in pertinent part:

> B. If trial is by a jury of twelve, each side is allowed six peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed four.
>
> C. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are

> unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court before the examination on the voir dire.

For purposes of this article, the number of sides in a lawsuit is determined by the legal posture of the parties. *Smith v. State Farm Ins. Co.,* 446 So.2d 1269 (La. App. 4th Cir. 1984), *writ denied* 449 So.2d 1356 (La. 1984). For the purposes of exercising peremptory challenges, multiple party defendants with adverse interests may constitute a single side. *Id.* The trial court's determination of the number of sides in a lawsuit is subject to the manifest error standard of review. See *Atkinson v. Celotex,* 93-924 (La. App. 3rd Cir. 3/2/94), 633 So.2d 383.

Arguably, as in *Atkinson,* because the liability of the Avondale Interests was based on theories different from that of the manufacturers, they are placed in a different posture and thus perhaps they were entitled to additional challenges. However, the Avondale Interests did not raise this issue at the trial level or brief it before this court. Consequently, as to them, the issue of inadequate peremptory challenges was waived. *Atkinson* has no application to other defendants who are suppliers or manufacturers.

Though defendants filed cross-claims, the thrust of their defense at the trial were factors other than third-party liability. Based on our review of the record and the various defenses raised by the parties, we cannot say the trial judge abused his discretion in the allocation of peremptory challenges.

COMMON ISSUE 8:

Whether the trial court erred in allocating time for opening and closing argument equally between plaintiffs and defendants as a group, and then requiring defendants to divide up the time between them so as to unfairly limit defendants' closing statement?

On appeal, Westinghouse argues that due to the limited time allotted, it was prevented from fully explaining its position in closing arguments. The record indicates otherwise. ACL adopted Westinghouse's argument on this issue.[10] The record indicates ACL was able to fully present its position in the time allotted. In its closing argument, ACL explained that it was not a manufacturer of any products; rather, it owned a mine containing asbestos, a naturally occurring substance. ACL went on to argue that when the dangers of asbestos dust were discovered, asbestos was not banned; instead, the levels of the dust were regulated. It discussed the fact that none of the plaintiffs were exposed to raw asbestos fiber. They were exposed to dust from a finished product. Additionally, ACL explained to the jury that it was bound by the laws of Quebec, which prevented it from complying with the discovery requests propounded by the plaintiffs. Finally, ACL discussed its position as to the lack of evidence presented by the plaintiffs.

We find no merit to the argument that the time limitation operated to ACL's detriment.

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[10] This issue is not mentioned in Avondale Interests' brief.

COMMON ISSUE 9:

Whether the trial court erred in conducting the trial in a manner that created undue pressure on defendants to put on a joint defense in a compressed time frame?

ACL (by adoption of Westinghouse's brief on this issue) argues it was forced to participate in a general defense with all the other defendants, and thus the jury was unable to separate plaintiffs who presented no evidence of exposure to their product. ACL suggests that the trial court should have declared a mistrial after the plaintiffs' case lasted five months because it was clear that the defendants would not have an opportunity to present all of their facts. This issue is raised in the Avondale Interests' brief.

The plaintiffs argue that the appellants have failed to point to a single fact they would have proved, or evidence they would have introduced had they not presented a joint defense, or had they been given more "trial days." Plaintiffs contend there was no error egregious enough to support the appellants' assertion that the trial court should have ordered a mistrial.

Appellants have failed to demonstrate any specific instances of how they were prevented from fully presenting their position. The jury interrogatories show that not all plaintiffs recovered from the same defendants, and several defendants were exonerated by the jury. We find no merit in this argument.

COMMON ISSUE 10:

Whether the trial court erred in admitting into evidence and allowing plaintiffs' counsel to make statements and arguments about documents without establishing a proper evidentiary foundation.

(*See* discussion under Common Issue No. 13)

COMMON ISSUE 11:

Whether the trial court improperly limited defendants' ability to challenge the reliability and credibility of plaintiffs' diagnoses, including precluding defendants from presenting the testimony of Avondale employees regarding their participation in the asbestos screening process?

ACL and the Avondale Interests argue that the trial court erred by not allowing them to introduce evidence of a rescinded contingency fee contract between attorney David Nutt (not an attorney in this case) and Pulmonary Advisory Services, Inc. ("PAS"). PAS employed Dr. Larry Mitchell, the doctor who originally diagnosed many former Avondale employees with asbestos-related diseases. The issue was originally raised in writ number 96-C-067, which was denied by this Court. This Court held that the trial court did not err in denying the defendants the right to introduce the contingency fee contract or question the plaintiffs about it without first establishing its link to the plaintiffs involved or until a representative of PAS was called as a witness.

The appellants further argue that the trial court erred by failing to allow the testimonies of William Tucker and Walter Floyd into evidence. Tucker and Floyd are former Avondale employees who would have allegedly testified that

they were misdiagnosed with asbestos-related diseases by Dr. Richard Kuebler. The issue was originally raised in writ number 96-C-087, which was denied by this Court. This Court held that the trial court did not abuse its discretion by failing to allow the testimonies of Tucker and Floyd into evidence. The depositions of Tucker and Floyd were proffered by the defense.

PAS CONTINGENCY FEE CONTRACT

The defendants allege that evidence of a contingency fee contract between PAS and David Nutt was necessary to "impeach the medical evidence upon which much of the plaintiffs' cases relied." The trial court held that the evidence was not relevant under LSA-C.E. art. 403 and that it could not be used to attack the credibility of any witness under LSA-C.E. art. 607 since no representative of PAS was called as a witness in the suit.

David Nutt is a plaintiff's attorney in Mississippi. He sent many of his clients, some of whom were employees of Avondale, to PAS to be tested for asbestos-related diseases. Nutt allegedly entered into a contingency fee arrangement with PAS and promised them fifteen percent (15%) of the gross amount of any settlement or judgment. This contract was later rescinded. Nutt was not an attorney in the present case, was in no way affiliated with present counsel, and had nothing to do with the plaintiffs as a whole. He was not called as a witness. PAS is outside the subpoena power of the trial court and its representative, Glenn Pitts, was never called as a witness in the present case.

The trial court first stated that the evidence was inadmissible because it was not being used to attack the credibility of a witness. "The credibility of a witness may not

be attacked until the witness has been sworn, and the credibility of a witness may not be supported unless it has been attacked."[11] The appellate court's review of credibility determinations is constrained by the manifest error standard, which demands that finding of fact by the trial court be given great deference and disturbed only when clearly wrong. *McCraw v. Louisiana State University Medical Center,* 627 So.2d 767 (La. App. 2nd Cir. 1993); *writ denied,* 94-0001 (La. 3/11/94), 634 So.2d 399.

Glenn Pitts, the representative of PAS, was not called as a witness. Neither was David Nutt or Dr. Larry Mitchell. Evidence of a contingency fee contract between Nutt and PAS would have only been relevant to attack the credibility of PAS or Dr. Mitchell. Since neither of these individuals were called as witnesses, and their diagnoses of the plaintiffs were not introduced into evidence, the contingency fee arrangement was inadmissible for impeachment purposes.

Even if the evidence were relevant, the trial court ruled it inadmissible because of its likely prejudicial impact on the jury. LSA-C.E. art. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

A trial judge's assessment of the probative value of evidence is afforded great weight. *Green v. Claiborne Elec. Co-op, Inc.,* 28,408 (La. App. 2nd Cir. 6/26/96), 677 So.2d 635. In

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[11] LSA C.E. art. 607(B).

the absence of a clear abuse of discretion in assessing the probative value of evidence, the ruling of the trial court will not be reversed on appeal. *Id.* at 639.

The trial court held that evidence of a contingency fee contract between PAS and David Nutt was not only irrelevant, but would be prejudicial and misleading. The contract was rescinded, David Nutt had no interest in the present case, and the test results from PAS and Dr. Mitchell were not introduced into evidence. A second set of medical tests were performed by other doctors and these reports were entered into evidence at trial. The trial court did not err in excluding the rescinded contingency fee contract from evidence.

TESTIMONIES OF TUCKER AND FLOYD

William Tucker and Walter Floyd were security guards at Avondale who allegedly were never exposed to asbestos. When Avondale learned that many of its employees were being tested for asbestos-related problems, it sent Tucker and Floyd to be tested. Tucker and Floyd were tested at PAS by Dr. Richard Kuebler. They both made false statements that they had been exposed to asbestos at the Avondale facility and signed affidavits to that effect. Both men were diagnosed by Dr. Kuebler as suffering from an asbestos-related disease.

The defendants attempted to introduce the testimonies of these two men to impeach the credibility of the plaintiffs' testing for asbestos-related diseases since both men were allegedly misdiagnosed. Neither Tucker or Floyd are parties to this suit. The trial court held that their testimonies were inadmissible because they were irrelevant to the proceedings and were not being used to impeach the credibility of a

witness.[12] Dr. Kuebler was not called as a witness by either party and the testing performed by him and Dr. Mitchell at PAS was never introduced into evidence. Plaintiffs argue that introduction of this evidence would have been prejudicial to the plaintiffs and would have far outweighed its probative value. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403. The trial court is vested with wide discretion in determining relevancy of evidence and its ruling will not be disturbed on appeal absent a showing of manifest abuse of that discretion. *Hooker v. Super Products Corp.*, 98-1107 (La. App. 5th Cir. 6/30/99), 751 So.2d 889, 909, citing *Earhart v. Brown,* 97- 522 (La. App. 5th Cir. 10/28/97), 702 So.2d 976, 984. The trial court did not abuse its discretion in excluding this evidence.

COMMON ISSUE 12:

Whether the trial court erred in allowing plaintiffs' expert witness reports to be admitted into evidence and reviewed by the jury during deliberations, and by admitting expert reports without the experts present to testify?

ACL (by its adoption of Westinghouse's brief on this issue) argues that the trial court erred by admitting medical reports into evidence that were generated by non-treating medical experts when those experts were not called as witnesses. Also, they allege that the trial court erred by admitting medical reports into evidence that were generated

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12 See LSA C.E. arts. 403 and 607.

by medical experts who were called as witnesses, because this improperly allowed the jury to view the reports during deliberation. ACL further argues that medical reports submitted into evidence are hearsay and inadmissible because they do not fall under any of the exceptions listed in Code of Evidence article 803. Appellants rely on *Butler v. Overnite Transportation,* 444 So.2d 676 (La. App. 5th Cir. 1984), and *Ewell v. Schwegmann Giant Super Markets,* 499 So.2d 1192 (La. App. 5th Cir. 1986), which they contend held that doctor's reports are hearsay and cannot be used in lieu of testimony.

Avondale Interests argue that the written reports of plaintiffs' medical experts who testified at trial were improperly admitted into evidence because the live testimony is the "best evidence." They also argue that since the jurors could not take notes, the admission of plaintiffs' medical reports created an unfair advantage with the jury having "notes" for plaintiffs' experts' direct testimony but no notes for the cross-examination. ACL also adopted Avondale Interests' argument.

MEDICAL REPORTS ADMISSIBILITY:

The cases, *Butler* and *Ewell,* cited by appellants are distinguishable from this case. These cases held that medical reports cannot be used in lieu of testimony to establish the facts therein. However, in this case all the plaintiffs' medical experts testified, all were subject to cross-examination, and their reports were not used in lieu of testimony. Therefore, the hearsay rule does not apply. With regard to these seven plaintiffs, Dr. Gaziano, who diagnosed Alfred Adams, Lester Badeaux, and William Boudreaux, testified on December 12, 1995. Dr. Zimmet, who diagnosed Alfred Adams, Oscar Champagne, and Alvin Robin, testified on November 30,

1995 and December 1, 1995. Dr. Casolaro, who diagnosed Leroy Bonamour, testified on November 15, 1995. Dr. Lorino, who diagnosed Roger Quave, testified on October 16, 1995.

Medical records maintained by a physician in his regular course of business as a provider of medical services are admissible under the "business records" exception to the hearsay rule. LSA C.E. art. 803(6); *Gilchrist v. Ozone Spring Water Co.,* 93-2515 (La. App. 4th Cir. 6/30/94), 639 So.2d 489. Also, statements for purposes of medical treatment and medical diagnosis in connection with treatment are admissible under the exceptions to the hearsay rule. LSA C.E. art. 803(4); *Dardeau v. Ardoin,* 97-144 (La. App. 3rd Cir. 11/5/97), 703 So.2d 695, 697. Therefore, we find that the trial court did not err in admitting both the plaintiffs' and defendants' experts' medical reports.

The Avondale Interests have also alleged that the trial court erred in allowing certain medical reports into evidence in violation of the "best evidence rule" because expert witnesses had already testified to the information contained within them and "the direct testimony of experts is the best evidence of their opinions."

The "best-evidence" rule is to be applied sensibly and with reason. *State v. Sartain,* 98-0378 (La. App. 4th Cir. 12/13/99), 746 So.2d 837, 848. The trial court has broad discretion in determining the admissibility of evidence. Furthermore, courts are to resolve the admissibility of evidence in favor of receiving the evidence. *Dardeau v. Ardoin, supra,* at 697. Any prejudice caused by the introduction of medical reports by plaintiffs' doctors was neutralized by the introduction of the medical reports of the

doctors who examined the plaintiffs and testified on behalf of the defendants.

MEDICAL REPORTS IN JURY DELIBERATIONS:

Defendants argue that they were prejudiced because the jury was allowed to review the reports that contained the plaintiffs' experts' direct testimony during deliberations. We find this argument without merit. The pre- revision version of LSA-C.C.P. art. 1794(B) stated:

> B. The court may allow the jury to take with them any object or writing received in evidence, except depositions and except as otherwise provided in the Louisiana Code of Evidence.

The trial court properly admitted the medical reports into evidence and therefore under 1794(B) the trial court did not abuse its discretion in allowing the jury to take these reports to deliberations. The reports were not depositions or verbatim transcripts of the medical testimony. Both the plaintiffs' and defendants' reports were allowed in the jury deliberations to assist the jury's recollection of individual plaintiffs and their claims. Absent a manifest abuse of discretion, the judgment of the trial court must be affirmed.

CONCLUSION:

The medical experts' reports for both the plaintiffs and defendants were properly admissible under LSA-C.E. art. 803(4) and 803(6). The medical reports were not used in lieu of testimony as all the plaintiff doctors testified at trial and were subject to cross-examination. Since the medical reports were properly admitted into evidence, the trial court did not commit manifest abuse of discretion in allowing the

jury to review reports that were received into evidence under LSA C.C.P. Art. 1794.

COMMON ISSUE 13:

Whether the trial court erred by allowing plaintiffs' counsel to testify during cross-examination.

Common Issue Numbers 10 and 13 are more easily addressed together. The statements allegedly made by plaintiffs' counsel, and the documents to which they refer (Issue No. 10), are not identified, nor is the alleged testimony by plaintiffs' counsel (Issue No. 13). These assignments of error suffer from a lack of specificity.[13]

The Avondale Executive Officers' brief denotes several instances of the alleged " testimony of counsel." After reading the record, we find that the questions of plaintiffs' counsel cited by the Avondale Interests are within the scope of cross-examination. When a party calls a hostile witness, a witness who is unable or unwilling to respond to proper questioning, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. Generally, leading questions should be permitted on cross-examination. LSA-C.E. art. 611(C). In Louisiana, wide latitude is permitted on cross-examination. The trial judge

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[13] According to Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4:

The argument on a specification or assignment of error in a brief shall include a suitable reference by volume and page to the place in the record which contains the basis for the alleged error. The court may disregard the argument on that error in the event suitable reference to the record is not made.

determines what is and what is not relevant, and his rulings are not disturbed on appeal in the absence of a clear showing of an abuse of this broad discretion. *Jeansonne v. Quinn,* 95-821 (La. App. 5th Cir. 4/16/96), 673 So.2d 1100. See also *Hill v. Leach,* 98-1817 (La. App. 3rd Cir. 4/21/99), 734 So.2d 116.

In brief, appellants refer to the questions at Vol. 69, pages 17, 202 and 17, 204. We note that appellants did not object to the questions at trial, nor have appellants demonstrated in this court how any of the questions prejudiced them. The party alleging error has the burden of showing that the error was prejudicial to his case. *Cash v. K.C.I. Const., Inc.,* 95- 1083 (La. App. 5th Cir. 5/15/96), 675 So.2d 297, 301, *writ denied,* 96-1811 (La. 10/25/96), 681 So.2d 369. Absent the necessary showing, this assignment of error is without merit.

COMMON ISSUE 14:

Whether the trial court erred in precluding defendants from using plaintiffs' pleadings in cross-examination.

As in several other common issues, the briefs suffer from a lack of specificity and a failure to cite to the record. Only Westinghouse attempted to brief this issue and so it should be considered abandoned as to the other appellants as per URCA 2-12.4.

COMMON ISSUE 15:

Whether the trial court erred in admitting post-1976 evidence of alleged dangerous environment at Avondale and in excluding evidence proffered by Avondale interests to rebut post-1976 hearsay evidence?

Avondale Interests argue that the trial court erred in allowing the introduction of evidence that was hearsay, unauthenticated, irrelevant, and prejudicial to them. The evidence in question was Avondale's safety record in the 1990s, complaint letters to OSHA from a "workers' safety committee" at Avondale regarding safety violations, OSHA citations to Avondale for safety violations in 1994 and 1995, and a newspaper article regarding safety at Avondale published in the *Times-Picayune* in 1994. This evidence was introduced during the cross-examination of Mr. Danny Joyce, a defense expert witness in industrial hygiene called by the Avondale Interests.[14]

The Avondale Interests argue that since they are statutorily immune for negligent conduct after 1976, this evidence was inadmissible, irrelevant, and prejudicial, besides being unauthenticated and hearsay. They also note that none of the objected-to evidence pertains in any way to Avondale's handling of asbestos, and they were not allowed to properly rebut this evidence.[15]

Plaintiffs argue that the introduction of the evidence was proper impeachment because Mr. Joyce's testimony put Avondale's post-1976 safety record at issue. They also argue that the Executive Officers remained liable for intentional

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[14] Mr. Joyce was a former employee of Avondale, having served as an industrial hygienist from 1980 to 1984 and as safety director from 1984 to 1991, when he left to form an industrial hygiene consulting business.

[15] The Executive Officers took two Writ Applications to this court regarding these issues, 96-C-134 and 96-C-138. This court denied both writs.

conduct after 1976, and thus the evidence was relevant. Plaintiffs further claim that Mr. Joyce authenticated all of the evidence, and that the newspaper article was authenticated under LSA-C.E. art. 902(6).

AUTHENTICITY

In his rebuttal testimony, we find that Mr. Joyce authenticated the OSHA citations from 1994 and 1995. A significant amount of his rebuttal testimony was devoted to explaining the nature of these citations and their outcome. Further, we find that the newspaper article was authenticated as per LSA-C.E. art. 902(6).

HEARSAY

Even though Mr. Joyce authenticated some of this evidence, another prerequisite to admissibility is that the evidence not be hearsay. Hearsay is generally inadmissible as evidence. La. C.E. art. 802. However, when an out-of-court statement is offered for a purpose other than to establish the truth of the assertion, the statement is not hearsay. *State v. Zeno,* 99-69 (La. App. 5th Cir. 8/31/99), 742 So.2d 699.

Plaintiffs argue that the complaint letters, the newspaper article, and the OSHA citations were offered to impeach Mr. Joyce's credibility. However, this evidence does not directly impeach any statements made by Mr. Joyce regarding Avondale's safety record, working conditions, asbestos handling, etc. before 1976. Nor does this evidence impeach Mr. Joyce's credibility as an expert or his past experience at Avondale, as all of this evidence concerns events occurring at Avondale after Mr. Joyce left employment there: events of which he had no direct knowledge nor professional responsibility.

We conclude that at its introduction, the complaint letters, OSHA citations, and newspaper articles were hearsay, and the defendants' objections were proper.

RELEVANCE

Avondale Interests argue that this evidence was irrelevant and prejudicial to them, because it concerned events occurring after 1976, and because none of the evidence concerned the central issue of this litigation, which was Avondale's handling of asbestos. Plaintiffs argue that post-1976 evidence was relevant to establish intentional tortious conduct of the Avondale Executive Officers, for which they are not immune to prosecution under R.S. 23:1032 as amended.

The record establishes that the parties agreed, pre-trial, that these suits alleged negligent conduct and not intentional conduct from any time period. Thus, post 1976 evidence was clearly irrelevant and not at issue. The letters and citations are from 1992 or later, with most being from 1994 and 1995. Not only is this after 1976, it is also after 1991, which is when the witness Danny Joyce ended his employment with Avondale.

None of this evidence concerned Avondale's safety record in handling asbestos. Therefore, at best, this evidence was clearly irrelevant to any testimony of Mr. Joyce. Plaintiffs argue that the "door was opened" to post- 1976 evidence during the testimony of Mr. Peter Territo. If in fact the defendants did open the door during his testimony, the proper place for this evidence's introduction would have been during Mr. Territo's cross- examination, not Mr. Joyce's.

CONCLUSION

The introduction of this evidence concerning post-1976 non- asbestos safety complaints at Avondale was clear error because this evidence was both irrelevant and hearsay. It did not relate to pre-1976 events at Avondale nor Avondale's handling of asbestos. The evidence was clearly hearsay because it was offered to prove the truth of the post 1976 safety complaints and citations. The evidence was not proper, however, to impeach any of Mr. Joyce's testimony because none of Mr. Joyce's limited post-1976 direct testimony concerned Avondale's post-1976 safety record.

We find, however, that Mr. Joyce was allowed sufficient opportunity on redirect examination to explain the nature of this evidence, particularly the OSHA citations. Thus, the error was made harmless and is not reversible. Though the Executive Officers would have preferred to introduce the testimony of the OSHA officials who investigated the citations, Mr. Joyce's testimony was sufficient to explain the citations and how they were resolved. His redirect examination, as a whole, served to explain and diffuse much of this prejudicial, irrelevant, hearsay evidence.

Also, the jury was instructed by the court in the final jury charge, "In considering whether or not any of the Avondale employees sued by plaintiffs were negligent" to only consider what the Executive Officers knew "before October 1, 1976." This limiting instruction, coupled with Mr. Joyce's testimony on redirect, were sufficient to limit any prejudicial harm caused by the improperly introduced evidence.

COMMON ISSUE 16:

Whether the trial court failed to properly instruct the jury regarding applicable law? (Unreasonably dangerous per se and sophisticated user and purchaser)

Appellants argue that the trial court erred in instructing the jury that it could find the manufacturer defendants liable if the jury determined that their products were unreasonably dangerous per se as defined in the case of *Halphen v. Johns-Manville Sales Corporation,* 484 So.2d 110 (La. 1986). Appellants argue that in both *Young v. Logue,* 94-0585 (La. App. 4th Cir. 5/16/95), 660 So.2d 32, and *Asbestos v. Bordelon, Inc.,* 96-0525 (La. App. 4th Cir. 10/21/98), 726 So.2d 926, the Fourth Circuit concluded that *Halphen*' s unreasonably dangerous per se liability constituted a substantive change in Louisiana products liability law that could not be applied retroactively, because the plaintiffs testified that their initial significant exposures occurred before *Halphen.*

UNREASONABLY DANGEROUS PER SE

In a jury trial, the judge has a duty to charge the jury as to the law applicable in a case and the correlative right and responsibility to require that the jury get only the correct law. LSA-C.C.P. art. 1792. The trial judge is not required to give the precise instructions submitted by either party. *Fisher v. River Oaks, Ltd.,* 93-677 (La. App. 5th Cir. 3/16/94), 635 So.2d 1209, 1213, *writ denied,* 94-0932 (La. 6/3/94), 637 So.2d 503. Adequate jury instructions are those that fairly and reasonably point up the issues and that provide correct principles of law for the jury to apply to those issues. *Fisher v. River Oaks, Ltd., supra.* The adequacy of jury instructions must be determined in light of the instructions as a whole

and the manifest error standard of review may not be ignored unless the instructions were so incorrect or inadequate as to preclude the jury from reaching a verdict based on the law and the facts. *Fisher v. River Oaks, Ltd., supra; Morgan v. ABC Manufacturer,* 96-59 (La. App. 5th Cir. 1/15/97), 694 So.2d 394, 397.

The law is clear that an appellate court must exercise great restraint before overturning a jury verdict on the suggestion that the instructions were so erroneous as to be prejudicial. *Cuccia v. Cabrejo,* 429 So.2d 232 (La. App. 5th Cir. 1983), *writ denied,* 434 So.2d 1097 (La. 1983).

ANALYSIS

We find that the Louisiana Supreme Court did not create new substantive law in *Halphen.* The court in *Halphen* merely compiled and interpreted the law with regard to products liability in Louisiana at that time. Justice Dennis, the author of *Halphen,* held in *Hulin v. Fibreboard Corporation,* 178 F.3d 316 (5th Cir. 1999), that *Halphen* applies retroactively. We find his language persuasive. The decisions of a court of last resort are not the law, but only the evidence of what the court thinks is the law.[16] The Supreme Court has held that unless a judicial decision specifies otherwise, it is given both retrospective and prospective effect.[17] A prospective-only application of judicial decisions is, in effect, legislating. Under Louisiana's Constitution, the

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[16] *Construction Materials, Inc. v. American Fidelity Fire Ins. Co.,* 388 So.2d 365, 367 (La. 1980), citing *Norton v. Crescent City Ice Mfg. Co.,* 178 La. 135, 145, 150 So. 855, 858 (La. 1933).

[17] *Succession of Clivens,* 426 So.2d 585, 587 (La. 1982).

power to make substantive laws is vested in the legislature. La. Const. Art. III sect. 1, Art. II sect. 1, 2.

Therefore, we find that the trial court properly instructed the jury of products liability law according to the *Halphen* decision.

SOPHISTICATED USER/PURCHASER

ACL argues that the trial court erred in refusing to include ACL's requested jury charges on the sophisticated purchaser and sophisticated user defenses. They argue that these instructions were important in their defense because ACL only mined and sold raw asbestos fiber, and it did not manufacture or produce any asbestos products. ACL contends that the other parties in the case were either sophisticated users or sophisticated purchasers of manufactured asbestos containing products.

ACL argues that the requested charges should have been given because they stated pertinent and applicable law that could have absolved them of liability, citing *Gonzales v. Xerox Corp.*, 320 So.2d 163, 164 (La. 1975). ACL points out that in *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998), ACL based its theory of defense on sophisticated purchaser, and was found free from liability. Under *Davis v. Avondale Industries, Inc.*, 975 F.2d 169 (5th Cir. 1992), ACL contends that a defendant is entitled to the submission of an appropriate instruction on its theory of defense.

Plaintiffs argue that the "unreasonably dangerous per se" charge was the applicable law to be given to the jury. Plaintiffs assert that the trial court concluded that no sophisticated user instruction would be given because the

defendants presented no evidence that the plaintiffs were in fact sophisticated purchasers or users.

Plaintiffs point out that the Louisiana courts have consistently rejected the sophisticated user doctrine and have held that the manufacturer has a duty to warn the user unless the user is aware of the danger or the danger is "open and obvious," citing *Horne v. Liberty Furniture Co.*, 452 So.2d 204 (La. App. 5th Cir. 1984); and *Fincher v. Surrette*, 365 So.2d 860 (La. App. 4th Cir. 1978). Plaintiffs further allege that under *Moore v. Safeway, Inc.*, 95- 1552 (La. App. 1st Cir. 11/22/96), 700 So.2d 831, 864, the jury's finding of products being unreasonably dangerous per se negates the relevance of the failure to give a sophisticated user charge.

LAW

The trial judge is not required to give the precise instructions submitted by either party. The trial judge must only give instructions that properly reflect the law applicable to the facts of a particular case. *Fisher v. River Oaks, Ltd., supra* at 1213; *Jones v. Liberty Mut. Ins. Co.*, 568 So.2d 1091 (La. App. 5th Cir. 1990). It is the judge's responsibility to reduce the possibility of confusing the jury, and he may exercise the right to decide what law is applicable to prevent counsel from arguing law that the trial judge deems inappropriate. *LaFrance v. Bourgeois*, 97-376 (La. App. 5th Cir. 10/15/97), 701 So.2d 1026, 1028-9, citing *Johnson v. Terrebonne Parish Sheriff's Office*, 95-1180 (La. App. 1st Cir. 2/23/96), 669 So.2d 577; *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 92- 1544 (La. App. 1st Cir. 3/11/94), 634 So.2d 466.

ANALYSIS

In *Halphen v. Johns-Manville Sales Corp., supra* the court held that there are four categories of unreasonably dangerous products, two of which are pertinent in this case: those that are unreasonably dangerous per se, and those with any danger inherent in normal use not known or obvious to the user of which the manufacturer has not adequately warned.

A product is unreasonably dangerous per se if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product. This theory considers the product's danger-in-fact, not whether the manufacturer perceived or could have perceived the danger, because the theory's purpose is to evaluate the product itself, not the manufacturer's conduct. *Halphen* at 114. If a jury finds that the product is unreasonably dangerous per se, then it is the product itself that has been evaluated, and the knowledge of the purchaser is irrelevant according to *Halphen.* In this case, the jury found that ACL's product was unreasonably dangerous per se.

The sophisticated user charge submitted and requested by ACL read:

> Manufacturers and sellers are not liable for dangers known to the user. There is no duty to warn a user of a danger that is obvious or of a common knowledge. Neither is there a duty to warn a user, sometimes defined as a 'sophisticated user,' who, through his familiarity with the product, is presumed to know of its dangers.

ACL points out that the sophisticated user defense was successfully asserted in *Damond v. Avondale Industries, Inc.*, 98-1275 (La. App. 4th Cir. 8/19/98), 718 So.2d 551. We find the *Damond* case distinguishable. In *Damond* the alleged defective product was sand, and the court found that "sand is not unreasonably dangerous per se," and nothing in the sand makes it unreasonably dangerous in its normal use. Sand may be an unreasonably dangerous product if there was a danger in its use in sandblasting that was not known or obvious. The court found that the danger created by airborne sand during sandblasting was obvious and known. In this case, invisible asbestos fibers caused the plaintiffs' lung injuries. This danger was not known or obvious to the workers at Avondale and was a characteristic of the raw asbestos itself, and not the result of some product modification or use. Therefore, the trial court did not err in refusing to give the requested sophisticated user charge.

We find that the case of *Cimino v. Raymark Industries, Inc., supra,* cited by ACL, is also distinguishable and not controlling. The Federal Fifth Circuit, in holding that the supplier of raw asbestos to manufacturers owed no duty to warn users of the manufacturer's products, applied substantive law of Texas, not Louisiana, in determining what the Texas Supreme Court might conclude were the parties' respective duties. *Cimino,* 151 F.3d at 299.

We find that the *Halphen* charge, which included unreasonably dangerous per se and the ordinary user language, was the applicable law, and provided the correct principles of law for the jury to apply to the issues. We further hold that the trial court's omission of ACL's requested sophisticated user charge was not error considering that the

dangers of raw, invisible asbestos fibers were not obvious or known to the plaintiffs in this case.

The court used the term "ordinary user" in its jury instruction, again relying on *Halphen:*

> Although a product is not unreasonably dangerous per se or flawed by a construction defect, it may still be an unreasonably dangerous product if the manufacturer fails to adequately warn about a danger related to the way the product is designed. A manufacturer is required to provide an adequate warning of any danger inherent in the normal use of its product which is not within the knowledge of or obvious to the ordinary user. *Halphen v. Johns-Manville Sales Corp.,* 484 So.2d 110, 114, 115 (La. 1986).

The Judge instructed the jury that there was no duty to warn of those risks that were **obvious** or **known.** Under *Halphen,* the court explained the different categories of unreasonably dangerous products recognized by most courts. The court held that whether the knowledge of the danger in a product is material, relevant, or admissible depends on the particular theory of recovery under which the plaintiff tries his case. If a jury finds that the product is unreasonably dangerous per se, then it is the product itself that is evaluated, and the knowledge of the purchaser is irrelevant. Under this theory, a charge concerning a "sophisticated user" or "ordinary user" is irrelevant and not warranted.

We find no merit in these arguments.

COMMON ISSUE 17:

Whether the trial court erred in refusing to allow certain jury charges and interrogatories related to the executive officer liability?

A. *RULES OF LAW FOR EXECUTIVE OFFICERS LIABILITY*

Avondale Executive Officers acknowledge that the trial court gave the basic charge with regard to executive officer liability from the case of *Canter v. Koehring, Co.,* 283 So.2d 716 (La. 1973). However, they argue that further explanation of the *Canter* charge according to *Smith v. Dow Chemical,* 92-883 (La. App. 1st Cir. 3/28/94), 635 So.2d 325, should have been given. In *Smith,* the Louisiana First Circuit held that a plaintiff must do more than establish negligence in the abstract or the existence of an on-the- job injury to impose liability on the co-employee defendant. The Avondale defendants contend that *Smith* made clear that the jury may not combine the separate knowledge of the executives together to find liability for any one of them, and that it was error not to instruct the jury on this language.

Avondale Executive Officers contend that the individual executive officer defendants were unaware of the risk of harm when workers were exposed to asbestos at the federally-approved level, citing as proof that in some cases, the Executive Officers defendants suffered the same injuries as plaintiffs.

The Louisiana Supreme Court, in *Canter,* laid out a four part test to determine executive officer liability. The applicable jury charge given by the trial judge was:

An employer, such as Avondale, owes a duty to its employees, such as plaintiffs, to provide a safe place within which to work. However, a corporation may delegate this duty to individuals in its employ, such as safety directors, plant managers, supervisors, and foremen. A person whom the company has delegated its duty to provide a safe place to work owes the company employees, such as plaintiffs, a duty to use due care not to injure them. That is, the safety personnel must not create or maintain any condition which will result in an undue risk of harm to others.

The law has established the following criteria for imposing individual liability:

1. The principal or employer owes a duty of care to the third person, which in this sense includes a co-employee, breach of which has caused the damage for which recovery is sought.

2. The duty is delegated by the principal or employer to the defendant.

3. The defendant officer, agent, or employee has breached this duty through personal as contrasted with technical or vicarious fault. The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances, whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others, as well as from the lack of ordinary care in discovering and

avoiding such risk of harm, which is resulted from the breach of the duty.

4. With regard to the personal fault, personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages.

In *Asbestos v. Bordelon, Inc., supra,* the Fourth Circuit held that there was no error in the *Canter* charge given to the jury.

We find no error in the trial court's instruction to the jury on executive officer liability pursuant to *Canter.* The jury was properly instructed concerning the four part test set forth in *Canter.* The trial court's instructions properly reflected the law applicable to the facts of this particular case.

B. COMPLIANCE WITH STATUTORY REGULATIONS

Avondale Interests allege that it was reversible error when the trial judge refused to charge the jury regarding consideration of compliance with statutory regulations by the Avondale Executive Officers. The record reflects that the jury was instructed with regard to applicable law and statutory regulations. The trial court's jury charge mentioned governmental standards and government regulations, and instructed the jury that:

> Compliance with government standards is but one element or item of proof of whether or not the product is defective.
>
> * * * *
>
> Louisiana courts have recognized that while statutory violations are not in and of themselves definitive of civil liability they must be guidelines for the court in determining standards of negligence by which civil liability is determined.

We find that this charge adequately instructed the jury concerning compliance with statutory regulations and how regulatory compliance should be considered when assessing negligence.

C. WHETHER THE CAUSE OF ACTION ACCRUED AFTER SEPTEMBER 30th, 1976.

The Avondale Executive Officers contend that it was reversible error when the trial judge refused to instruct the jury that the plaintiffs must have contracted a disease prior to 1976, and when the trial judge refused the jury interrogatory that stated:

> Do you find by a preponderance of the evidence, that plaintiffs contracted an asbestos related disease after September 30th, 1976?

We have already addressed the issue of when a cause of action accrues in long latency cases in Common Issue 3, and need not repeat it here. However, the determination of when a cause of action accrues is a fact question. Since Avondale Executive Officers are immune from tort liability after October 1, 1976, the trial court erred in not allowing the jury to determine whether or not the plaintiffs were injured prior

to 1976. The only reference to October 1, 1976 in the jury charges was an instruction by the judge that in considering whether or not any Avondale employees were negligent, "you should only consider whether or not they knew or had good reason to know that asbestos products as used at Avondale were hazardous to health before October 1, 1976."

The trial court should have given some limiting instruction or a jury interrogatory that would have allowed the jury to decide whether or not any injury occurred prior to October 1, 1976.

Due to this error, the appellate court must perform a *de novo* review on the issue and determine if each plaintiff's cause of action accrued before October 1, 1976. This detailed analysis will be performed when the court reviews each plaintiff's individual Assignments of Error. As to the seven plaintiffs addressed in this opinion, the record supports a finding that each incurred injuries prior to October 1976. This finding is based on each plaintiff's work history, which documented their repetitive exposure to asbestos prior to 1976, and the medical testimony concerning the effects of the exposure on each plaintiff's lungs.

COMMON ISSUE 18:

Whether, because of significant omissions and misstatements, the jury verdict form was misleading?

Appellant ACL adopted Westinghouse's argument that the jury verdict form was misleading and confused the jury. In support, appellants cite the following findings made by the jury, which they contend are incompatible with the basis of plaintiffs' claims and indicate the jury was confused:

1. That exposure to an appellant's asbestos product was a substantial contributing cause of plaintiffs' asbestos-related disease;
2. That appellant was negligent;
3. That appellants' product was unreasonably dangerous per se;
4. That appellant had reasonably designed its product;
5. That appellant had not failed to warn of hazards associated with asbestos; and
6. That appellant had not committed any fraudulent misrepresentation or concealment.

Avondale asserts that certain jury interrogatories related to their position were omitted.

Appellants suggests that the jury's answers indicate that they found the mere presence of any amount of asbestos in its product rendered the manufacturer absolutely liable. This conclusion, says appellants, is due to the erroneous *Halphen* instruction and the *Halphen* "unreasonably dangerous per se" interrogatory.

The plaintiffs counter that the jury was not misled and that there was substantial evidence to support the finding that appellants' product was unreasonably dangerous per se.

The testimony, which established that dangerous levels of asbestos fibers were released when asbestos products were cut, coupled with the testimony that asbestos fibers remain in the air for extended period of time, and that ingestion of fibers causes a disease process that is cumulative and progressive, all warranted both the *Halphen* charge and a

jury interrogatory. Since we have already rejected the reasoning of *Young v. Logue, supra* and determined that *Halphen* did not create substantive law and thus can be applied retroactively (see common issue 16), we are satisfied that no error resulted from giving that charge. Nor have appellants demonstrated how the charge and/or interrogatory confused the jury.

Finally, appellants advance the argument that the jury interrogatory, "Was the defendant's product unreasonably dangerous per se?" was legally inconsistent with other interrogatories. We disagree.

It is not necessarily inconsistent, under *Halphen,* to have instructions for both unreasonably dangerous per se and unreasonably dangerous in design and for failure to warn. The jury could have found both that the products were designed to perform as they were meant to perform, yet were unreasonably dangerous per se simply because they contained asbestos fibers that could be released into the air. Or, in other words, the product's design was not inherently dangerous, but it was the properties of the asbestos that made it so. This Assignment of Error lacks merit.

COMMON ISSUE 19:

Whether the trial court improperly calculated the credit allowed for the Johns-Manville settlement?

Appellant Avondale Interests argues that the trial court erred in calculating the credit allowed to the defendants for the Johns-Manville (hereinafter referred to as J-M)

Settlement Trust.[18] The trial judge refused to assign J-M a virile share even though the jury found J-M liable to the plaintiffs. Defendants argue that under Louisiana pre-comparative fault law, because the jury found J-M liable to the plaintiffs, the trial court should have assigned J-M a virile share.

Plaintiffs assert that the trial court properly interpreted the trust language and applied Louisiana law to arrive at its conclusion that defendants would receive a credit for the actual dollar amount when and if plaintiffs received any money from the trust, but J-M would not be assigned a virile share. The plaintiffs argue that the J-M Trust is not a "settlement" as per Louisiana law. Plaintiffs argue that the amount of plaintiff's award from the trust is determined by the trust, not by a jury verdict; therefore, there can be no true right of contribution between the trust and the defendants who have been found liable in this suit. Because the J-M settlement is not a true "settlement" under Louisiana law, and J-M is not a "released party," they argue that the trial court's "middle ground" solution is proper under the trust and Louisiana law.

Both sides quote the same specific language from the J-M Bankruptcy Trust Agreement in support of their positions.[19] The J-M Trust language designates how a

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[18] J-M did not directly participate in the trial. J-M had previously filed for bankruptcy protection, and the Johns-Manville Settlement Trust, established through the Bankruptcy Court, administered all claims against J-M. Most plaintiffs sued the Trust.

[19] The trust language referred to in this opinion comes from *In re Joint Eastern and Southern Districts Asbestos Litigation,* 878 F.Supp.

settlement receipt should be credited depending on whether a states' laws are pro rata or pro tanto. The defendants claim that Louisiana is a "pro rata" state, and, as per the language of the trust agreement, J-M should have been assigned a virile share.[20] Quoting the same language, the trial court found that Louisiana is not a pro rata state as defined by the Trust, and that the law in effect at the time of the tortious exposures, which was pre-comparative fault, dictates the specific result reached by the trial court.

ANALYSIS

It is well settled that pre-comparative fault law applies to these claims. *Cole v. Celotex, supra.* Prior to the passage of the Louisiana Comparative Fault Law, this state divided fault between solidary obligors by virile shares. If one or more solidary obligor were insolvent, a plaintiff could collect the entire judgment from one solidary obligor, who would then have a right of contribution against the solidary obligors who had not discharged their obligations. LSA-C.C. art. 1806, and repealed LSA-C.C. arts. 2104 and 2105. The risk that a judgment debtor was insolvent was born by his co- debtors, not the judgment creditor. *Harvey v. Travelers Ins. Co.,* 163 So.2d 915 (La. App. 3 Cir. 1964), and cases cited therein. If

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473, 591-592 (E.D.N.Y.1995), specifically Section 3, Calculation of set-off.

[20] At the time the jury verdicts were rendered, only two plaintiffs, Earlven Gauthe and Patrick Clark, who had mesothelioma, had received any money from the Johns-Manville Settlement Trust ($20,000). At that time, no other plaintiffs had applied to the trust, although in the Common Issue briefs it is alleged that the other plaintiffs have now applied to the settlement, though none but Gauthe and Clark had received any money.

a solidary obligor, solvent or insolvent, settled with the plaintiff for any amount, the other solidary obligors benefitted by a credit proportional to his virile share, not by the dollar amount he may have paid in settlement. Therefore, Louisiana is a pro rata state rather than a pro tanto state.

Plaintiffs cited the cases *Findley v. Falise,* 929 F.Supp. 1 (E.D.N.Y.1996) and *Brewer v. Fibreboard Corporation,* 127 Wash.2d 512, 901 P.2d 297 (1995), to support their position, and the trial court noted both in its Reasons for Judgment (notwithstanding the verdict). The *Brewer* court's analysis of Washington law shows, however, that Washington is a pro tanto state, and therefore this case is not applicable. Our analysis of the *Findley* case shows that the applicable Maryland statute provided only for a pro tanto reduction in liability in the absence of an express agreement to the contrary. Maryland law is not similar to Louisiana virile share law, and therefore is also inapplicable.

The trial court found that Louisiana does not fit within the Trust's Section 3(c) definition of a pro rata state because of LSA-C.C. art. 1806. However, we find that article 1806 does not apply to solidary obligors who have created a settlement trust fund. We note that this is not a case where any plaintiff has depended upon Johns Manville's solvency. The Trust's immediate and persistent problems in funding settlements has been long known,[21] and since J-M was sued

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[21] *In re Joint Eastern and Southern Districts Asbestos Litigation,* 878 F.Supp. 473 (E.D.N.Y. 1995) details the Trust's establishment in 1988 and its difficulties in funding distributions to the massive amount of claimants.

and included on the jury interrogatories, assigning J-M a virile share is correct under Louisiana law. If the jury found J-M liable it would form a basis for the plaintiffs to apply and recover something from the Trust.

CONCLUSION

Under pre-comparative fault law, Louisiana was a virile share (pro-rata) state. The trial court failed to assign J-M a virile share, and in doing so, erred. The total number of virile shares should be recalculated, as to any plaintiff to whom the jury found J-M liable, to include a virile share for J-M.

ACL COMMON ISSUES AND DISCOVERY SANCTIONS

ACL filed a Common Issue brief in which it ignored the characterization and number designation of common issues that it was instructed to follow in the Court's briefing schedule. ACL identifies 23 Common Issues, the bulk of which have already been dealt with by the Court in the Common Issues 1 through 19 discussion. ACL did identify some Common Issue Assignments of Error that are specific to its case. ACL in its appellant brief on the Group I plaintiffs restates its position with regard to these specific Assignments of Error, and the Court will now address those Assignments of Error.

DISCOVERY SANCTIONS

ACL mined and milled raw chrysotile asbestos fiber. ACL did not manufacture any asbestos containing products. Plaintiffs alleged ACL sold the raw fibers to various companies who incorporated these fibers in their manufactured products. Plaintiffs allege that while working

at Avondale they were exposed to these products that contained asbestos fibers mined and sold by ACL.

Plaintiffs submitted numerous discovery requests directed to ACL. Portions of these requests were answered. However, many requests were not answered because ACL claimed that by answering the requests, they would violate the Quebec Business Concerns Records Act (QBCRA). ACL claims QBCRA prohibits the production of information from records that are within the Providence of Quebec. ACL refused to answer other requests because they were over broad or unduly burdensome.

Plaintiffs filed a Motion to Compel, which resulted in the trial court's issuance of a discovery sanction that provided: (1) the plaintiffs were entitled to a presumption that each plaintiff had been exposed to asbestos mined, sold, or supplied by ACL; (2) ACL was prohibited from introducing any evidence to the contrary; and (3) ACL's defenses were limited to medical issues, whether ACL's conduct constituted negligence, or whether ACL could be held liable under the principles of strict products liability.

ACL has listed three Assignments of Error related to the discovery sanction imposed by the trial court against it. On appeal, ACL contends that the trial court erred in entering this sanction and prohibiting ACL from putting forth all its defenses, that the trial court erred in entering an excessive discovery sanction, and that plaintiffs were not prejudiced by ACL's failure to comply with discovery.

The plaintiffs point out that ACL took an Emergency Writ (95-C-722) to this court when this discovery sanction was levied against it. This court denied the writ, finding the imposition of sanctions was within the trial court's discretion,

and further that ACL "has an adequate remedy on appeal since it should be permitted to proffer the excluded evidence."

LSA-C.C.P. art. 1471 provides for sanctions when a party fails to comply with an order compelling discovery. Sanctions allowed under article 1471 include:

> (1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.
>
> (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

Much discretion is given to the trial court in selecting appropriate sanctions for failure to comply with discovery orders. *Hurtle v. State Farm Mutual Auto Insurance,* 94-870 (La. App. 3rd Cir. 3/1/95), 651 So.2d 418. The appellate court must find a clear abuse of discretion to overturn a judgment granting sanctions. *Id.*

In this case we find that the discovery sanctions were imposed without sufficient procedural due process safeguarding. Jurisprudence suggests the trial court should have issued an order requiring discovery responses, including an Order that the failure to do so would result in a named sanction, i.e. irrebuttable presumption. We hold that the sanction was excessive in this case; however, ACL had an adequate remedy on appeal since this court, in response to the writ filed concerning the discovery sanction, instructed ACL to proffer the excluded evidence concerning whether or

not ACL supplied raw asbestos that was incorporated into products that caused injury to Avondale employees.

LSA C.C.P. Art. 1636 states in part:

> A. When the court rules against the admissibility of any evidence, it shall either permit the party offering such evidence to make a complete record thereof, or permit the party to make a statement setting forth the nature of the evidence.

ACL did not proffer any evidence that its asbestos fibers were not incorporated into any of the products used at Avondale. The purpose of a proffer was discussed in *McLean v. Hunter,* 495 So.2d 1298, 1305 (La. 1986): "Without a proffer, appellate courts have no way of ascertaining the nature of the excluded testimony."

We hold that ACL's contention that to proffer any evidence would be overly burdensome is without merit. ACL could have easily identified the manufacturers it sold raw asbestos to or, in the alternative, proffered testimony that it did not sell asbestos fiber to the asbestos product manufacturers who were defendants in this case. We decline to reverse the outcome of this seven month jury trial based on ACL's argument of inappropriate discovery sanctions when ACL chose not to introduce that evidence in the form of a proffer.

ACL ASSIGNMENT OF ERROR I

The trial court erred in refusing to include jury charges for sophisticated purchasers and sophisticated users.

See discussion of Common Issue No. 16.

ACL ASSIGNMENT OF ERROR II

The trier of fact erred in finding ACL negligent in the absence of evidence thereof.

ACL ASSIGNMENT OF ERROR III

The trier of fact erred in holding that plaintiffs proved their respective exposures were of sufficient regularity, proximity and frequency to meet their burden of proof for causation.

ACL's Assignments of Errors II and III both address negligence and causation; hence, we will address these two errors together.

Plaintiffs alleged that ACL sold raw asbestos fibers to various companies who incorporated these fibers in their manufactured products. Plaintiffs argue that while working at Avondale they were exposed to these products that contained asbestos fibers mined and sold by ACL.

ACL contends that the plaintiffs failed to establish the first element for a finding of negligence: causation. ACL argues that the plaintiffs did not set forth any evidence that the raw asbestos mined by ACL caused their injuries. ACL further alleges that the trial court erred in holding that the plaintiffs met their burden of proving their respective exposures to ACL's product under Louisiana negligence/product liability law. Plaintiffs argue that the asbestos was unreasonably dangerous per se and thus ACL was liable. Plaintiffs contend that the discovery sanction created an irrebuttable presumption that plaintiffs were exposed to ACL asbestos, and therefore, proved cause-in-fact.

ANALYSIS

To determine whether a defendant is negligent, the case usually requires proof of five separate elements: (1) duty; (2) breach of duty; (3) cause in fact; (4) scope of liability or scope of protection; and (5) damages. *Porteous v. St. Ann's Cafe & Deli,* 97-0837 (La. 5/29/98), 713 So.2d 454. In this case, ACL alleges that the plaintiffs failed to prove the third element, that their product was a cause in fact of the plaintiffs' injuries. Specifically, ACL alleges that each individual plaintiff failed to prove that their respective exposures to ACL's asbestos product were of sufficient regularity, proximity, and frequency to carry their burden of proof.

A method for determining cause-in-fact, which is generally used when multiple causes are present, is the "substantial factor" test. Under this test, cause-in-fact is found to exist when the defendant's conduct was a "substantial factor" in bringing about plaintiff's harm. *Roberts v. Benoit,* 605 So.2d 1032, 1042 (La. 1991). The substantial factor test in this case was met due to the discovery sanction imposed by the trial court. The sanction explicitly stated that once a plaintiff proved he was exposed to asbestos, there was a presumption that he had been exposed to asbestos mined, sold or supplied by ACL. In light of this sanction, there is substantial evidence in the record to allow a jury to reasonably conclude that plaintiffs were exposed to asbestos that presumptively was supplied by ACL, and therefore, ample evidence to allow the jury to find ACL's asbestos substantially contributed to their injuries.

ACL ASSIGNMENT OF ERROR IV

The trier of fact erred in finding ACL liable for fraud in the absence of proof thereof.

By this Assignment of Error, ACL argues that plaintiffs failed to plead any allegations of fraud by ACL with particularity. ACL also urges that plaintiffs did not meet procedural requirements because they failed to allege that ACL committed fraud or allege that ACL was a member of any of the asbestos trade organizations to which the allegations were specifically directed. It is further alleged that fraud was not proven by a preponderance of the evidence.

Plaintiffs counter with references to evidence documenting efforts by Quebec Asbestos Manufacturer's Association (QAMA), the asbestos industry organization of which ACL was a member, to suppress information about the connection between lung disease and asbestos.

ANALYSIS

Under LSA-C.C. art. 1953, fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. According to LSA-C.C.P. art. 856, when pleading fraud, the circumstances constituting fraud shall be alleged with particularity.

In this case, plaintiffs specifically plead that members of the trade association QAMA committed fraud and conspired among themselves and with other asbestos manufacturers, distributors, and trade organizations to injure the plaintiffs. ACL was added as a defendant in this matter by the

"Supplemental and Amendment to Petition" filed on November 17, 1994. In the amended petition, paragraphs 10 through 25 from the previously filed petitions were incorporated by reference against ACL. Paragraphs 21 through 25, which allege fraud, placed ACL on notice of the fraud allegations.

There was ample evidence presented at trial to support the allegations that ACL was a participating member of QAMA and conspired to commit fraud. Minutes of a meeting of QAMA held on March 28th and 29th, 1968, were introduced into evidence as Plaintiffs' Exhibit-339. The document stated that the asbestos mining companies had known of the dangers of asbestos since 1918, and that it could cause fibrosis of the lung. It also stated that QAMA had a suspicion that asbestos could cause cancer since 1935. The document lists as one of the persons present M.P. Carson, a representative for ACL.

Dr. Herbert K. Abrams, an expert in preventive medicine, public health, and occupational medicine called by the plaintiffs, testified that ACL as a member of QAMA plotted the suppression of a 1947 study (P-38), showing 20% of workers exposed to asbestos levels below the then federal standard would likely die. The association published a watered down version (P-39) of the study, which claimed that workers exposed to asbestos did not contract lung cancer more than other people did.

The actionable element in a claim for fraud is not the conspiracy itself, but rather the tort that the conspirators agree to perpetrate, and which they actually commit in whole or in part. In order to recover under this theory of liability, a plaintiff must prove that an agreement existed to commit an illegal or tortious act, which resulted in the plaintiff's injury.

Aranyosi v. Delchamps, Inc., 98-1325 (La. App. 1st Cir. 6/25/99), 739 So.2d 911 (some citations omitted).

We hold that the pleadings placed ACL on notice of the fraud claim against it and that there is evidence to support the jury's conclusion that ACL committed fraud by participating in the suppression of the truth of the dangers of asbestos. Evidence exists in the record establishing that ACL was a participating member of QAMA, and that QAMA supported the suppression of medical studies that indicated the dangers of asbestos fibers. Therefore, the jury could reasonably conclude that ACL's conduct was fraudulent.

THE CAUSATION PROBLEM IN ASBESTOS LITIGATION[22]

Asbestos litigation presents unique legal problems.

> 'Asbestos' is the name given to a family of hydrated silicate minerals which occur naturally as masses of fibers with the unique properties of relative indestructibility and high resistance to fire. These properties combine to make asbestos an invaluable ingredient in a variety of products used to protect human life. The heat-resistant properties and fibrous structure of asbestos make it extremely desirable as a fireproofing, insulating, and friction- resistant material. These unique properties make it a

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22 The title of this section and the following quote is taken directly from an article by Craig A. Etter, "The Causation Problem in Asbestos Litigation: Is There an Alternative Theory of Liability?" 15 Ind.L.Rev. 679, n. 5 (1982).

valuable ingredient in such products as brake shoes on automobiles, fireproof clothing, fire-resistant wallboard and cement, and coverings for pipes and electrical wiring. See *U.S. Dep't of Health Educ., and Welfare Publ. L.* No. 78-1594.

Masses of asbestos fibers, when disturbed in any manner, have a tendency to break easily into tiny dust particles which become suspended in the air. Extended periods of ingestion and inhalation of these particles have recently been linked to such debilitating diseases as asbestosis, bronchogenic carcinoma, and mesothelioma. Each of these diseases has a documented latency period of twenty to forty years after the initial exposure to asbestos. This latency period is explained by the fact that asbestos fibers, once inhaled, remain in place in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible. Even if no additional fibers are inhaled, tissue damage may continue undetected for decades. Furthermore, the effect of the disease is cumulative because each exposure to asbestos dust can result in additional tissue damage. *See generally* Comment, *Asbestos Litigation: The Dust Has Yet To Settle, 7 FORDHAM URB.* LJ. 55, 63 (1978).

A major problem in asbestos litigation has been the inherent difficulty in identifying the manufacturer of the particular product that causes the plaintiff's injuries. Asbestos plaintiffs generally have been exposed to a wide variety of products containing asbestos. The probability that these plaintiffs were actually harmed by any particular asbestos product is a function of the percentage of asbestos

in each product and the tendency of the asbestos to free itself from that product. The method in which a product is used or applied plays an important role in determining the propensity of that product to release asbestos fibers. Asbestos bonded in a finished product does not present significant health risks unless the product is disturbed in such a way as to free fibers in the air. On the other hand, sprayed asbestos insulation, which has a very high propensity to release asbestos dust, is extremely dangerous to health. Medical studies on asbestos exposure indicate that the diseases linked to asbestos inhalation increase in severity in a direct relationship to the length of exposure to asbestos dust.

To prevail, a plaintiff in an asbestos case must show, by a preponderance of the evidence, that he was exposed to asbestos from the defendants' products, and that he received an injury that was substantially caused by that exposure. When multiple causes of injury are present, a defendant's conduct is a cause in fact if it is a substantial factor generating plaintiff's harm. *Quick v. Murphy Oil Co.,* 93-2267 (La. App. 4th Cir. 9/20/94), 643 So.2d 1291.

There can be more than one cause in fact of an accident as long as each cause bears a proximate relation to the harm that occurs and it is substantial in nature. A plaintiff seeking to recover under either negligence or strict liability theories must prove that the negligent act or defect complained of was a cause-in-fact of the injury. *Davis v. State Farm Ins. Co.,* 558So.2d 636 (La. App. 1st Cir. 1990).

In *Quick v. Murphy Oil Co.,* the court found that:

> When evaluating liability in an asbestos claim, we apply traditional theories of tort liability (for example, negligence and products liability) which

require proof of causation. See *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992); *Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110 (La. 1986); *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983), *cert. den.* 465 U.S. 1102, 104 S.Ct. 1598, 80 L.Ed.2d 129 (1984). Asbestos cases typically involve multiple defendants and courts have analyzed the cases under concurrent causation, a doctrine which "proceeds from the assumption that more than one defendant substantially contributed to the plaintiff's injury." *210 E. 86th Street Corp. v. Combustion Engineering, Inc.*, 821 F.Supp. 125, 150 (S.D.N.Y. 1993).

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In *Dixie Drive It Yourself System v. American Beverage Co., supra,* the Supreme Court stated that "conduct is a cause-in-fact of harm to another if it was a substantial factor in bringing about that harm." *Id.*, [242 La. 471,] 137 So.2d [298,] at 302 [(1962)]. The court stated that negligent conduct is a substantial factor if the harm would not have occurred without the conduct, i.e., *but for* defendant's conduct, plaintiff would not have sustained injury. The court thereby equated the two concepts of substantial factor and necessary antecedent. Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company,* 30 La.L.Rev. 363, 373 (1970).

* * * *

> The Louisiana Supreme Court recently stated that cause in fact is usually a "but for" inquiry which tests whether the harm would not have occurred but for the defendant's substandard conduct, and the substantial factor inquiry is an alternative method of analysis used when two or more combined causes are present. [cites omitted]. The substantial factor inquiry is applicable to this case because two or more causes are present.

Quick makes clear that a plaintiff's burden of proof against multiple defendants in a long-latency case is not relaxed or reduced because of the degree of difficulty that might ensue in proving the contribution of each defendant's product to the plaintiff's injury. Thus, in an asbestos case, "the claimant must show that he had significant exposure to the product complained of to the extent that it was a substantial factor in bringing about his injury." *Asbestos v. Bordelon, Inc., supra* at 948.[23]

We are satisfied that application of the above principles is appropriate in the instant cases and our review will be guided accordingly. Thus, we will examine the evidence relative to each plaintiff and determine if it was sufficient to support the jury's determination of causation.

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[23] The term "exposure" in asbestos cases means the inhalation of asbestos fibers in the lungs. *Asbestos v. Bordelon, supra,* at 26, 726 So.2d at 948.

JNOV ASSIGNMENT OF ERROR

Each appellant assigns as error the trial court's granting of JNOVs in two respects: 1) the trial court's raising the jury's determination of the plaintiffs' damage awards, and 2) the trial court's overturning the jury's findings of liability with respect to nine settling parties.

STANDARD FOR JNOV

In *Anderson v. New Orleans Public Service, Inc.*, 583 So.2d 829 (La. 1991), the court set forth the law regulating this procedure as follows:

> In *Scott v. Hospital Service District No. 1*, 496 So.2d 270 (La. 1986), we set forth the criteria to be used in determining when a JNOV is proper. A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. If there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. *Scott, supra.* In making this determination, the court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party.

> In reviewing a JNOV, the appellate court must first determine if the trial court erred in granting the JNOV. This is done by using the aforementioned criteria just as the trial judge does in deciding whether to grant the motion or not, i.e. do the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable men could not arrive at a contrary verdict? If the answer to that question is in the affirmative, then the trial judge was correct in granting the motion. If, however, reasonable men in the exercise of impartial judgment might reach a different conclusion, then it was error to grant the motion and the jury verdict should be reinstated.

See also *Scott v. Hospital Service District No. 1,* 496 So.2d 270 (La. 1986); *Maltby v. Lyttle,* 99-1143 (La. App. 5th Cir. 2/29/00), 758 So.2d 875.

This strict standard for granting a JNOV was recently reaffirmed by the Supreme Court in *Davis v. Wal-Mart, Inc.,* 2000-0445 (La. 11/28/00), 774 So.2d 84.

JNOV OVERTURNING LIABILITY AS TO NINE SETTLING PARTIES [24]

Appellants argue that the trial judge erred in granting JNOV in favor of nine settling defendants[25] (Anchor Packing, Armstrong World Industries, Babcock & Wilcox, Combustion Engineering, Flexitallic, Garlock, Rapid American, Rock Wool Manufacturing, and Uniroyal), removing them from the virile share calculation of plaintiffs' damage awards.[26] In so doing, the trial court found:

> This Court finds no evidence was introduced by defendants on the danger-in- fact or the utility of any of these non-parties' products or whether these

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[24] The plaintiffs entered into settlements with the following parties, according to the transcript: Fibreboard, *Garlock, Rock Wool,* UNR Industries, *Rapid American, Combustion Engineering, Babcock & Wilcox,* Owens-Illinois, and *Uniroyal.* The underlined parties plus Anchor Packing, Armstrong World Industries, and Flexitallic were granted JNOVs and removed from the virile share calculation. Various plaintiffs also entered into settlements with OCF, Pittsburgh-Corning, A.P. Green Industries, Asbestos Claims Management, and GAF Corporation, according to a Settlement Stipulation filed in this court on June 8, 2000.

[25] The trial court granted JNOVs in favor of *nine,* not six, settling defendants and/or non-parties. In a case of conflict, the judgment, and not the reasons for judgment, controls. *McCalmont v. Jefferson Parish Sheriff's Office,* 99-940 (La. App. 5th Cir. 1/12/00), 748 So.2d 1286.

[26] The trial court must calculate virile shares because the plaintiffs' cases are governed by pre-comparative fault law, as per *Cole v. Celotex,* 599 So.2d 1058 (La. 1992).

> nonparties were in fact the manufacturers of the particular products. Defendants did not introduce any evidence whether these products contained asbestos, whether the product produced dust in normal use, and/or what type of asbestos fibers were used. The defendants have not directed this court to any evidence proving fault by these nonparties.

The only evidence presented at trial regarding these nonparties or their products was testimony by some plaintiffs that these products were used at Avondale Shipyards and that they were believed to contain asbestos.

This is not sufficient evidence to establish strict liability under the unreasonably dangerous per se theory.[27]

As we stated above (in the Causation section), the first element of proof under either negligence or products liability is causation, and with multiple defendants, this inquiry is directed by the "but for" and "substantial factor" tests found in *Quick v. Murphy Oil, supra.* Reviewing the evidence in the record with these standards in mind, we agree with the appellants that as to four parties, Babcock & Wilcox, Combustion Engineering, Rapid American, and Rock Wool, the "blanket" JNOV was improper, as the record contains evidence that each product was used at Avondale and contained asbestos that could have contributed to the plaintiffs' dust exposure. The trial judge was legally incorrect when he made the determination that *no* reasonable

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[27] From the trial court's Reasons for Judgment (JNOV), December 6, 1996.

mind could have found that these four manufacturers could be liable to plaintiffs for their injuries.

Many plaintiffs testified specifically that Babcock & Wilcox boilers were used on vessels at Avondale. They contained asbestos and asbestos cement, both of which were released into the environment when the boilers were installed and tested. Plaintiffs testified specifically that Combustion Engineering boilers were used at Avondale. They contained asbestos and asbestos cement similar to the Babcock & Wilcox boilers. Many plaintiffs in various occupations worked in the engine rooms in proximity to these products as the boilers were installed and tested.

Rapid American (Philip Carey before 1966) manufactured, among other products, Careytemp, an asbestos-containing pipe covering similar to Kaylo. Several plaintiffs identified Careytemp as used at Avondale. Burnett "Frenchy" Bordelon, head of the insulation shop at Avondale, identified it, in his deposition, as an insulation product used at Avondale. One other plaintiff identified a Rapid American asbestos cement used at Avondale. The record is replete with references that asbestos pipe insulation created large amounts of asbestos dust during its cutting, installation, and also during repairs and removal. Several plaintiffs testified that pipe insulation often needed to be removed and/or repaired during the construction of new vessels as pipe welds were tested, for example, and that this activity created clouds of dust. Rock Wool manufactured insulation and Delta-Made One Shot asbestos cement used at Avondale. Many plaintiffs, as well as Peter Territo and Danny Joyce, testified that One Shot was used at Avondale, and in fact it was described as the most commonly used asbestos cement there. Testimony established that One Shot

contained asbestos and created copious amounts of dust when mixed with water. The dried cement also released large amounts of dust when it was ripped off the pipes by various trades of workers in the course of their duties (as, for instance, when pipe leaks were identified and repaired, or when insulation was replaced), which was frequently described by witnesses.

The evidence shows, however, that each plaintiff was not necessarily exposed to each of these four manufacturers' products. As noted previously, in asbestos cases, the term "exposure" refers to inhalation of asbestos fibers into the lungs. *Asbestos v. Bordelon, Inc., supra.* So although we find that the JNOVs in their favor were incorrect, it does not necessarily follow that these four manufacturers are liable to each plaintiff. Accordingly, we will consider each settling defendant's liability vis á vis each individual plaintiff, and alter the individual virile shares accordingly.

Regarding the products of Anchor Packing, Armstrong World Industries, Flexitallic, Garlock, and Uniroyal, evidence is completely lacking that they contributed to the plaintiffs' injuries. The trial judge's grant of JNOV in favor of these five manufacturers was correct. Though these products were identified by various witnesses, that evidence merely established their physical presence at Avondale, which is insufficient evidence to support the jury's findings that the manufacturers are liable to plaintiffs.

Only a few witnesses identified Anchor Packing products, and there was no testimony, expert or factual, about Anchor's products' properties or propensity to emit asbestos dust. Likewise, only five witnesses mentioned Armstrong: three identified Armstrong as the maker of asbestos tiles and gaskets that were used at Avondale, and

two others testified specifically that they did not recall Armstrong products at Avondale. There was no testimony, expert or factual, about the physical properties of Armstrong products, their uses, or their propensity to emit asbestos dust.

Flexitallic and Garlock are identified by several plaintiffs as manufacturers of gaskets that were used at Avondale. But most plaintiffs who identified the gaskets said merely that they "remembered [Flexitallic, Garlock] them" or they "worked around" gaskets. There was no testimony to establish that the gaskets were used in their presence in a way to cause the emission of dust. The only expert evidence about any gaskets was supplied by Clayton Jewett, the representative of Garlock who described his gaskets' physical properties, asbestos content, and uses, and who testified that Garlock gaskets' chemical composition made them highly unlikely to produce significant amounts of dust.[28] He described the manufacturing process of a compressed asbestos gasket. There was testimony that most of the gaskets were pre-cut. Only two of the 129 plaintiffs testified that they had to cut and/or remove gaskets and this activity created dust. Their testimony failed to establish which of the at least four[29] gasket manufacturers' gaskets produced this dust.

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[28] This court notes the extensive evidence offered about Garlock and Flexitallic gaskets in *Asbestos v. Bordelon, Inc.*, 96-0525 (La. App. 4th Cir. 10/21/98), 726 So.2d 926, despite which the trial court found insufficient evidence that these products caused a significant exposure to asbestos dust, and granted these parties a directed verdict.

[29] Armstrong, Flexitallic, Garlock, and Uniroyal.

Uniroyal made asbestos cloth, gaskets, and cement material. Only three of the one hundred twenty-nine plaintiffs testified that they saw Uniroyal products, primarily asbestos cloth, at Avondale. However, only one witness, Charles Gautreaux, testified that cutting the asbestos cloth released dust. He described this dust as being 1000 times less than the dust produced when pipe insulation was cut. There is testimony that the asbestos blankets used by welders for fire protection caused dust to fly into the air when shook out, but this does not establish that the released dust was part of the blanket. The evidence establishes that this was most likely a redistribution of the dust already in the immediate environment. Likewise, there was testimony by one plaintiff that he saw a bag of Uniroyal cement material, but there was no evidence that this cement contained asbestos or that it was used in significant amounts.

Accordingly, the JNOV granted in favor of Anchor Packing, Armstrong, Flexitallic, Garlock, and Uniroyal is affirmed. The JNOVs granted in favor of Babcock & Wilcox, Combustion Engineering, Rapid American, and Rock Wool will be reviewed by this court on a plaintiff specific basis to determine whether the trial court's JNOVs were supported by the evidence. Babcock & Wilcox, Combustion Engineering, Rapid American, and Rock Wool Manufacturing will remain in the virile share calculation of those plaintiffs whose work histories show that they were exposed to significant asbestos dust from those manufacturers' asbestos-containing products.

Next, we review seven individual plaintiffs' JNOV judgments, both as to the quantum and as to whether the evidence supports the jury's finding that some or all of the nine settling parties are liable to the individual plaintiffs.

JNOVs ON QUANTUM

The appellants argue that the trial court erred in raising the plaintiffs' individual damage awards. They argue that the trial court violated the legal standards in granting the JNOVs on quantum. The trial court is required to follow the same legal standards in considering a JNOV on quantum as the court must follow in considering JNOVs on other issues.

The appellate court, in determining whether the trial court erred in granting the JNOV as to quantum, once again uses the criteria set forth in *Scott v. Hospital Service District No. 1,* 496 So.2d 270 (La. 1986), *supra,* i.e., could reasonable men in the exercise of impartial judgment differ as to the fact that the jury award was either abusively high or abusively low. If the answer is in the affirmative, then the trial court erred in granting the JNOV, and the jury's damage award should be reinstated. On the other hand, if the answer is in the negative, then the trial court properly granted the JNOV, and its damage award based on its independent assessment of the damages is the judgment of the trial court which is reviewed on appeal under the constraints of *Coco v. Winston Industries, Inc.,* 341 So.2d 332 (La. 1976), *supra.*

Mendoza v. Mashburn, 99-499 (La. App. 5th Cir. 11/10/99), 747 So.2d 1159.

JNOV differs from a motion for additur; the non-moving party must consent to the additur. See LSA-C.C.P. art. 1814. This also differs from a grant of a motion for new trial, which employs a less stringent standard. *State Dept. of*

Transp. & Development v. Scramuzza, 95-786 (La. App. 5th Cir. 4/30/96), 673 So.2d 1249.[30]

The jury heard the testimony and saw reports from the many doctors who examined or interpreted medical tests concerning the 129 individual plaintiffs. The expert medical testimony of the plaintiffs' doctors and the defendants' doctors differed widely in diagnostic criteria, standards for testing, and ultimate diagnoses. It is important to note that not all of the doctors for either side examined all of the plaintiffs. To aid our resolution of the individual quantum awards, we will first review the general testimony of each doctor, plaintiff and defendant, who testified regarding these seven plaintiffs, and then will review each plaintiff specifically.

Dr. Larry Mitchell of Pulmonary Advisory Services examined most of the plaintiffs in Pascagoula, Mississippi, in 1991. He did not testify and his reports were not entered into evidence, but several plaintiff doctors relied upon those reports and based their diagnoses, wholly or partly, upon their interpretations of Dr. Mitchell's reports. Dr. Mitchell was not a board certified lung specialist.

Dr. Gaeton Lorino testified for the plaintiffs. He was a pulmonologist, specializing in the treatment and diagnosis of lung diseases, who practiced in Mobile, Alabama. Dr. Lorino examined 27 plaintiffs. He gave them a questionnaire, chest x-rays, and pulmonary function tests.

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[30] Affirmed in part and reversed in part on other grounds, *State, Dept. of Transp. & Development v. Scramuzza* 96-1796 (La. 4/8/97), 692 So.2d 1024.

Dr. Lorino said that 25 out of the 27 plaintiffs had asbestosis, and the other 2 had pleural disease.

Dr. Dominic Gaziano, who testified for the plaintiffs, was board certified in internal medicine, pulmonary disease, and critical care medicine. He practiced in Charleston, West Virginia. Dr. Gaziano reviewed the x-rays and pulmonary function tests of 34 plaintiffs, but did not examine them all personally, and diagnosed them all with asbestos-related disease. He relied upon the x-rays and reports generated by Dr. Mitchell of Pulmonary Advisory Services. Dr. Gaziano testified that not everyone exposed to asbestos will get an asbestos-related disease. Asbestosis is a dose-related disease. With heavy exposures for long time periods, he opined that almost all get asbestosis.

Dr. Anthony Casolaro testified for the plaintiffs. He was accepted as an expert in lung disease and pulmonology. He practiced in Arlington, Virginia. About ninety percent of the 50 or 60 plaintiffs that he examined he diagnosed with asbestosis. To diagnose asbestosis, Dr. Casolaro explained that one needs a history of exposure and latency, a history of symptoms, chest x-ray changes, and pulmonary function tests. Dr. Casolaro was of the opinion that people with asbestosis are at an increased risk of cancer.

Dr. Stephen Zimmet testified for the plaintiffs. He was board certified in internal medicine. He was medical director of respiratory services at Arlington Hospital, affiliated with Georgetown University, and was a clinical associate professor of medicine at Georgetown and a consultant with Harvard as pulmonologist. He came to Louisiana with Dr. Casolaro. Of 30 plaintiffs he saw, he diagnosed 25 with asbestosis. Virtually all patients he had seen with asbestosis had been in connection with litigation.

To diagnose asbestosis, he looked for occupational or associated exposure, x-rays, pulmonary functions, and physical examinations.

Dr. Zimmet stated that not every person exposed to asbestos will develop asbestosis. There is a dose-response relationship, but there is also an individual sensitivity or individual responsiveness. Dr. Zimmet testified that shipyard welders and other workers who spend a good portion of time in close proximity to pipefitters are at a significantly increased risk for asbestosis from a statistical standpoint. He agreed that one cannot predict which person will have progression to asbestosis and which will not.

Dr. Ewing W. Cook testified for the defendants. He was an associate professor of medicine at the LSU School of Medicine and practiced at Baptist Hospital (now Memorial Medical Center) in New Orleans. He practiced in the areas of internal medicine and pulmonary medicine. Medical/legal cases were a minor part of his practice, perhaps five percent. He examined 19 plaintiffs, and found that ten had no effects of asbestos exposure whatsoever. The remaining nine plaintiffs had some pleural changes associated with asbestos exposure, but none had asbestosis, and he felt that none of them would progress to asbestosis. His examination included development of exposure history, history of any other medical problems, a physical examination, pulmonary function studies, and chest x-rays.

Dr. W. Brooks Emory, an expert in pulmonary medicine, testified for the defendants. Dr. Emory was the head of the Pulmonary Medicine Department at Ochsner Medical Center. To determine whether a person had asbestosis, he used the American Thoracic Society criteria. Dr. Emory concluded that the 44 plaintiffs he examined did

not have lung function impairment due to asbestos exposure. He said that the general condition of these 44 men was poor; some had arteriolosclerosis and heart disease, six already had had open heart surgery, some were obese, and all them were overweight. Also, more than 30 of them were smokers or ex-smokers, so they had some propensity for health problems independent of asbestos.

Dr. Thomas Grimstad testified for the defendants. He was an internist at West Jefferson Hospital; his practice was primarily pulmonary. Five percent or less of his work was medical/legal. He saw a great deal of asbestos-related diseases in his practice. He examined 16 of the plaintiffs. He interviewed them, examined them, did chest x-rays and pulmonary function studies, and rendered reports. He found that ten of the sixteen plaintiffs had no asbestos effects.

Dr. Grimstad testified that not everyone exposed to asbestos will get an asbestos-related disease, not even the majority, in his experience. Pleural changes and plaques are a reflection of exposure to asbestos, but are not a disease in and of themselves. Most pleural plaques do not cause any problems and alone, do not pose a higher risk of cancer, but might in combination with asbestosis.

Dr. Eugene Rosenberg testified for the defendants. Dr. Rosenberg was a pulmonologist. He was a graduate of Tulane Medical School. He was board certified in both internal medicine and pulmonary diseases and had been in practice at West Jefferson Medical Center since 1979. Dr. Rosenberg evaluated twenty-six of the plaintiffs and prepared reports on them. He collected a thorough medical history with regard to exposure, past medical history, medications, allergies, surgeries, social history, smoking history, and family history, and he did a head-to-toe physical

examination, including vital signs and x-rays. He found that very few fit the occupational exposure profile, and very few had lung scarring on x-ray.

Dr. Rosenberg testified that there were a couple of cases where he could not rule asbestosis in or out, because the only sign was a reduction in diffusion capacity. Of all the people he saw, he was not concerned about any of them developing long term problems with disability based upon progression of their disease. Everyone he saw had very, very mild effects, they had been away from the exposure for a long time, and were unlikely to progress further. Dr. Rosenberg explained that pleural plaquing reflects a history of exposure, but did not necessarily mean that the patient had a lung tissue disease and it did not mean that the patient would develop pleural complications.

Dr. Robert Jones, an expert in internal and pulmonary medicine, testified for the defendants. In 1969-70, he participated in a study at the Johns-Manville and National Gypsum plants in the New Orleans area that involved about 900 workers who made asbestos products. He testified that not everyone who is exposed to asbestos develops asbestosis.

Dr. Jones examined 24 plaintiffs. He diagnosed six individuals with normal x- rays, normal lung function tests, and no asbestos-related diagnosis. He found that eleven plaintiffs had some x-ray abnormalities but none related to asbestos, and no asbestosis, pleural plaques or pleural thickening. He found that 5 more plaintiffs had pleural plaques, but felt that none of them would progress. Dr. Jones disagreed with all the plaintiffs' doctors regarding the diagnosis of all these 24 plaintiffs. Dr. Jones believed that most asbestos- related disease claims are specious because they are manufactured for the purpose of litigation. He stated

that a lot of the claims in this case had been fabricated specifically to bring to court and to enrich attorneys.

Dr. David Hunter testified for the defendants. Dr. Hunter was certified as an expert in radiology and specifically in radiologic interpretation of dust diseases, including asbestos-related diseases. Through Dr. Grimstad and Dr. Rosenberg, he reviewed x-rays of 42 plaintiffs. Of the 42 he examined, he found zero percent to have asbestosis.

It is apparent, from reading the diagnostic opinions of the expert doctors who examined the plaintiffs, that the jury heard conflicting and sometimes opposing expert medical opinions about these plaintiffs' diagnoses. Juries are not bound by expert testimony; rather, expert testimony must be weighed just as any other evidence. The weight to be accorded to the testimony of experts depends largely on their qualifications and the facts on which they base their opinions. *Asbestos v. Bordelon, Inc., supra.* The jury's damage awards in this case reflect the widely opposing diagnoses they heard from the experts. It is not unreasonable, based on the evidence that they heard, for the jury to have concluded that the asbestos-related effects these plaintiffs suffered were, in many cases, very mild.

The Fourth Circuit in *Asbestos v. Bordelon, Inc., supra,* faced a similar scenario when it reviewed a jury's findings that were based upon testimonies of several expert medical witnesses. That court maintained, as we do here, that it was up to the jury to determine the credibility, demeanor, and weight of the testimony of the various experts. Reasonable rejection by the trier of fact of one physician's testimony for the testimony of another physician is permissible. *Asbestos v. Bordelon, Inc.* at 973. Our review of the expert medical

testimony shows that the jury's damage determinations were not unreasonable.

The trial court used the valuations in *Atkinson v. Celotex, supra,* to raise the jury's damage awards. The lowest award in *Atkinson* was $20,000.00. It is important to our consideration that in *Atkinson* on appeal, the plaintiffs argued that the low jury awards represented an abuse of discretion. This argument was rejected. The jury in *Atkinson,* as in this case, was presented with conflicting medical evidence regarding alleged asbestos injuries. The Third Circuit found no abuse of the jury's discretion and affirmed the quantum awards stating:

> The differing medical evidence concerning the nature of and correlations among pleural disease, asbestosis, and cancer was irreconcilable and, we think, equally plausible. In such a circumstance, we must abide by the rule of appellate review articulated in *Martin v. East Jefferson General Hospital,* 582 So.2d 1272 (La. 1991), which states that where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong.

Most of the plaintiffs in *Atkinson* had visible pleural plaques on their lungs found by both plaintiff and defense doctors, and additionally suffered from other symptoms. Our review of the plaintiffs in this case shows that the medical experts disagreed about the objective x-ray evidence of asbestos exposure, disagreed about the result of many of plaintiffs' respiratory tests, and universally disagreed regarding asbestosis diagnosis. *Atkinson* held that if two permissible views of the evidence exists, the fact finder can choose between them. A jury verdict that takes part of one

expert's view and part of a conflicting expert's view, and compromises those views to arrive at its factual finding is not unreasonable. The finder of fact is required to assess the credibility of both expert and lay witnesses to determine the most credible evidence. The fact-finder need not accept all of the testimony of any witness as true, and may accept or believe as true only a part or parts of a witness's testimony. *Holmes v. Southeastern Fidelity Ins. Co.*, 422 So.2d 1200 (La. App. 1st Cir. 1982), *writ denied* 429 So.2d 133 (La. 1983).

In this case, the jury awards ranged from $800.00 to over $70,000.00 for those workers who did not contract cancer. We found only three reported cases in Louisiana that address quantum awards to plaintiffs who suffered non-cancer asbestos injuries: *Asbestos v. Bordelon, Inc., supra, Atkinson v. Celotex, supra,* and *Lilley v. Board of Supervisors of Louisiana State University,* 98-1277 (La. App. 3rd Cir. 3/24/99), 735 So.2d 696. All cases deal with multiple plaintiffs. In *Atkinson* the damage award range varied from $20,000.00 to $40,000.00. In *Bordelon,* the quantum range varied from $100,000.00 to $375,000.00, and in *Lilley,* the plaintiffs were awarded compensatory damages for fear of cancer ranging from $15,000.00 to $30,000.00.

The *Jury Verdict Research Series* provides some assistance in evaluating the reasonableness of this jury's quantum award by allowing us to compare their awards with jury verdict results from around the nation. The publication states that the verdict range for asbestosis is $5,000.00-

$15,600,000.00.[31] A case similar to the case at bar, *Srite v. Owens- Illinois,* 870 S.W.2d 556 (Tex.App.-Hous. (1 Dist.) 1993), involved nine plaintiffs who received no money for past damages, and future damages ranging from $20,000.00 to $65,000.00. In the case of *Cain v. Armstrong World Industries,* 785 F.Supp. 1448 (S.D.Ala.1992), the trial court granted a new trial finding that the jury's six figure compensatory damage awards were not only greatly disproportionate to the injury in each of the cases but also the damage awards were unsupported by the evidence. The trial court in *Cain,* in its reasons for granting a new trial, cited another Alabama case in which four asbestosis cases were consolidated for trial, and the jury awarded compensatory damages of $6,500.00 to two of the four plaintiffs. The Institute for Civil Justice published an article in 1984 stating that the average total compensation awarded was $54,000.00 for asbestosis, $83,000.00 for lung cancer and $256,000.00 for mesothelioma, and that only a small percentage of the claimants with no manifest asbestos-related injury received compensation; those few that did usually only received a few hundred dollars.[32]

In asbestos litigation, there is a significant variance in the assessment of damages by juries, and similarly situated asbestos victims may receive payments that vary by a factor

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[31] JURY VERDICT RESEARCH SERIES, LRP Pub. No. 4.90.2, BASIC INJURY FOR RESPIRATORY TRACT INJURIES at 8 (2000).

[32] R-3132-ICJ Inst. Civ. Justice 1984, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES, James S. Kaklik, et al.

of ten or more.[33] In New Jersey, a verdict for pleural plaques will be in the $0-$15,000.00 range, while in nearby Pennsylvania, before a substantially similar jury, the same case could easily receive a $250,000.00 verdict. In some jurisdictions, for every five claims brought, one or two will result in defense verdicts, one or two will be a plaintiff's verdict in the range of $10,000.00-$25,000.00, and the fifth will receive a jury verdict of $100,000.00-$1,000,000.00. The facts making up those claims are often identical; same claimed exposure, same age, same x-ray readings, and the same doctors testifying to the same sets of medical facts; however, the jury verdicts differ.[34]

Each quantum award must be evaluated based on the facts of each individual case. Given the conflicting medical evidence presented to the jury in this case, we cannot say that the jury quantum awards in this case were unreasonable. We will next discuss the individual plaintiffs' quantum awards and the jury's liability findings concerning the settling defendants, which affect virile share contributions to the damage award.

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[33] Christopher F. Edley & Paul C. Weilder, *Asbestos: A Multi-Billion-Dollar Crisis,* 30 Harv. J. on Legis. 383, 395 (1993).

[34] Lester Brickman, Proceedings of the Administrative Conference of the United States, October 31, 1991 Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims-*The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?,* 13 Cardozo L.Rev. 1819, 1857 (1992).

ALFRED ADAMS

The jury awarded Alfred Adams $12,150.00 in general damages. The trial court's JNOV raised this damage award to $27,150.00. We reverse the JNOV and reinstate the jury's damage award.

Adams worked for Avondale in the Main Yard from 1962-1974, for approximately 14 years, as a shipfitter. He was 71 at the time of trial (1996). He never smoked. During the time he worked at Avondale, Adams worked around asbestos products such as Unibestos, Calcilite, Super-7, and Super-11. He used asbestos cloth that had names like Weldguard, Fireguard, and Unigard. He also used asbestos packing and "rope on a roll." The gaskets and packing were made by GAF. He saw the Johns-Manville name but could not associate it with a specific product. Adams's work history as reported to Dr. Cook shows occupational exposure to asbestos in the engine room where he sometimes worked alongside insulators. He said he never heard a warning about asbestos from anyone, nor was he ever given a respirator.

In 1974 Adams fell 30 feet into the hold of a ship; he has been disabled ever since. The accident broke ribs on both sides, his collarbone, and caused a compound fracture of his leg. He suffered significant chest trauma in this accident. He testified that these injuries caused him some breathing problems, but nothing like he suffers today. Since the 1974 accident he has led an inactive lifestyle. Medical reports from 1975 and 1976 show that he suffered from shortness of breath and breathing problems.

Drs. Gaziano and Zimmet testified for the plaintiff regarding Adams's asbestos-related medical condition. Dr. Gaziano opined that Mr. Adams had asbestosis with a mild

to moderate degree of pulmonary functionary impairment. Dr. Zimmet diagnosed pulmonary asbestosis. Neither doctor knew about Adams's 1974 accident.

Dr. Cook examined Mr. Adams on behalf of the defendants. He reported that Adams began experiencing shortness of breath following his fall in 1974. Adams reported that his shortness of breath never improved. Since his disability in 1974 he has had an inactive lifestyle. Dr. Cook found no evidence of interstitial lung disease, pulmonary fibrosis, pleural thickening, or lung crackles and wheezes. He related any shortness of breath to Adams's significant chest trauma in the 1974 accident, and his sedentary lifestyle since. Dr. Cook testified that Adams did not suffer from asbestosis.

The jury heard evidence that Adams had been exposed to asbestos while employed at Avondale, and that his lungs showed markers of that exposure visible by x-ray. They also heard evidence that Adams, a 71 year old who had lived a sedentary lifestyle for 21 years before trial, suffered a traumatic chest injury that was likely to cause his shortness of breath and x-ray markers. The plaintiff doctors gave a diagnosis of asbestosis on the basis of the x-ray and pulmonary function tests alone, without knowing Adams's medical history of the significant chest trauma he suffered in the 1974 fall. The defendants' doctors testified that Adams did not have asbestosis. In light of these factors, the jury's damage award of $12,500.00 was reasonable. Evidence was presented that could allow the jury to conclude that Adams was minimally affected by his exposure to asbestos. The JNOV increasing Adams's damages is reversed, and the jury's damage award is reinstated.

Regarding Mr. Adams's claim, the jury returned findings against all of the nine settling parties[35] that the trial court reversed in its JNOV. Previously in this opinion we affirmed the grant of JNOV in favor of five parties (Anchor Packing, Armstrong World Industries, Flexitallic, Garlock, and Uniroyal). As to the remaining four (Babcock & Wilcox, Combustion Engineering, Rapid America, and Rock Wool), as a shipfitter, Adams worked in the engine rooms of ships in the presence of boilers. The insulating cement that was used in Combustion Engineering boilers had Combustion Engineering's name on it, and the insulating cement used for the Babcock and Wilcox boilers had their own name on it as well. There is evidence in the record that the installation of these boilers required the application and removal of the asbestos cement, which produced large amounts of asbestos dust. There is sufficient evidence to support the jury's finding against Combustion Engineering and Babcock & Wilcox in favor of Adams.

Rapid American made Careytemp insulation, which was similar to Kaylo in its use and propensity to emit copious amounts of asbestos dust when used as intended. The evidence supports a finding that Adams and other shipfitters were exposed to insulation dust while working in the ships, and therefore the evidence reasonably supports the jury's finding against Rapid American in favor of Adams. Likewise, Rock Wool manufactured Delta Made One Shot cement, the most widely used asbestos-containing cement at

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[35] Anchor Packing, Armstrong World Industries, Babcock & Wilcox, Combustion Engineering, Flexitallic, Garlock, Rapid American (Philip Carey prior to December 1966), Rock Wool Manufacturing Co., and Uniroyal, Inc./ United States Rubber Co.

Avondale, which was used to finish pipe insulation in the engine rooms. The evidence shows that the use of this cement added large amounts of asbestos to the work environment, and therefore the jury's finding against Rock Wool in favor of Adams is also supported by the record.

Accordingly, Adams's individual judgment is amended to reverse the trial court's JNOV and reinstate the jury's verdict against four of the nine settling parties: Babcock & Wilcox, Combustion Engineering, Rapid American, and Rock Wool.

LESTER BADEAUX

The jury awarded Lester Badeaux $6,000.00 in damages. On JNOV, the trial court increased it to $18,500.00. We reverse the JNOV and reinstate the jury's damage award.

Badeaux worked at Avondale from March of 1968 to January of 1972, and again from July of 1972 until September of 1972, for a total of 4 years and one month. He told Dr. Emory that he was never exposed directly to asbestos products, though at trial he testified that he used fire blankets a lot, and that he worked around insulation and "half-rounds" a lot. He identified Kaylo as the half-rounds and said he used mud and the asbestos cement One Shot. He saw Garlock and Flexitallic gaskets but did not work with them; he also saw rope packing but did not use it. He had never heard of Unibestos. As a shipfitter, the majority of his work was not performed around the insulators. He left Avondale in 1972 and at trial was "feeling fine," and only went to get tested for asbestosis because other friends of his were getting tested.

At the time of trial, Badeaux owned his own dump truck and worked full time. He testified that he had some shortness of breath. He had a chest x-ray in 1990 when he had some chest pains; it was interpreted as normal, and he had no restrictions on his activities. Dr. Gaziano diagnosed him with asbestosis and minimal pulmonary impairment; Dr. Emory found that he had no asbestos disease, and found his pulmonary function tests were normal. On cross examination, Dr. Gaziano stated that he could not say that Badeaux had any lung function impairment, which differs from his report.

After considering Badeaux's exposure to asbestos that ceased over 20 years before trial, medical test results, and current good health, the jury awarded him $6,000.00. Considering the evidence, which can be interpreted to find Badeaux was minimally affected by asbestos, we cannot say that the jury was unreasonable in awarding its verdict. The judge erred, therefore, in increasing the damage award on the motion for JNOV.

Of the nine settling parties, the jury returned findings against 6: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Garlock, Rock Wool, and Uniroyal. As noted, this court affirms the JNOV in favor of Anchor Packing, Garlock, and Uniroyal. Regarding Babcock, Combustion, and Rock Wool, while Badeaux did not specifically testify that he worked around boilers, he did testify that he worked in the engine rooms, where the boilers are located. For the same reasons as expressed regarding Alfred Adams, the evidence supports the jury's findings against these two boiler manufacturers, and likewise supports a finding against Rock Wool, the cement manufacturer. The trial court's JNOVs in

their favor are reversed as to Mr. Badeaux, and the jury's findings are reinstated.

LEROY BONAMOUR

The jury awarded Bonamour $12,800.00. The JNOV increased it to $27,800.00. We reverse the JNOV and reinstate the jury's damage award.

Leroy Bonamour worked for Avondale in the main yard for approximately 20 years total, from 1957-58, 1961-76, 1977-79 and 1980-81, as a tacker. He was sometimes loaned out to different crafts when things were slow. He worked with machinists, boilermakers, and hydraulic mechanics. Ninety-five percent of his work was done on ships.

Mr. Bonamour testified that he worked with Kaylo. He also testified that he worked around Hopeman Brothers. He worked around pipe covering, cement, asbestos cloth gaskets, packing, and blankets. He remembered product names like Kaylo, GAF mud, Unibestos, Garlock, Marinite, and Micarta. He worked all over the ship when installing labelplates. He worked on icebreakers, LST's, DE's, DEG's, Coast Guard cutters, ESSO tankers, Lykes ships, Gulf Shipsides, Navy vessels, LASH ships, and LNG's.

Bonamour stated that it was very dusty in the engine rooms and where Hopeman Brothers worked. He never attended any safety meeting with respect to any of the products he was using at Avondale. He never used a respirator and was never offered a respirator during the years he worked at Avondale.

Bonamour was examined by Dr. Casolaro for the plaintiffs and Dr. Emory for the defendants. Dr. Casolaro diagnosed Bonamour with asbestosis with moderate

pulmonary impairment. He found that Bonamour's x-ray showed interstitial lung disease and pleural plaques. Dr. Casolaro stated that Bonamour has a greater risk of developing cancer.

Dr. Emory diagnosed pleural disease. He pointed out that Bonamour had asthma and bronchitis. Bonamour admitted that he had smoked 1/2 pack cigarettes a day since 1955. Dr. Emory's report found pleural plaques or pleural thickening caused by asbestos, but he concluded Mr. Bonamour did not have asbestosis.

The jury clearly concluded that Bonamour had been exposed to asbestos. However, given the conflicting medical testimony as to what effect the asbestos exposure had on Bonamour, we cannot say that a reasonable person would not have a basis for awarding damages of $12,800.00.

Of the nine settling parties, the jury returned findings against 7: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Garlock, Rapid American, Rock Wool, and Uniroyal. As noted above, we affirm the JNOV in favor of Anchor Packing, Garlock, and Uniroyal. Bonamour's testimony that he worked along side boiler makers, and the evidence regarding the boilers' asbestos-containing insulation, is sufficient to support a finding against Babcock & Wilcox and Combustion Engineering. Likewise, for the reasons expressed for Alfred Adams against Rock Wool and Rapid American, there is sufficient evidence for the jury's findings against them in favor of Mr. Bonamour. The JNOVs in their favor are reversed as to Mr. Bonamour, and they are returned to his virile share calculation.

WILLIAM BOUDREAUX

William Boudreaux was awarded $6,800.00 by the jury. The JNOV raised it to $19,300. We reverse the trial court's JNOV and reinstate the jury's damage award.

Boudreaux was 45 years old at trial. He worked as a tacker from 1/68- 12/68. He was rehired in 8/69-3/70 as a tacker. Then he was rehired again in 2/72-6/72. In 8/73 he was rehired as tacker-welder until 4/74. All of these employment stints were at the Harvey Quick Repair Yard. Boudreaux only worked at the main yard for two months in 1968. He worked at Avondale for only about 27 months total, and had last been employed there 21 years before trial. He worked around insulators and pipefitters while working on ships. He worked with the cloth but did not cut any himself. At the time of trial he worked for the Jefferson Parish School Board.

Boudreaux testified that he was "exposed" to asbestos cloth and packing. He stated that he also used asbestos cloth to protect himself. He worked around pipe covering and cement on a "daily basis." He stated that he saw no warnings of asbestos dangers on any products. He further testified that he attended no safety meetings. He stated on cross that he did not use pipe covering; at most, he held it.

Boudreaux remembers seeing the product Kaylo when he went to the warehouse. At the main yard, he worked on the *MICHIGAN* cargo ship and the *SAN FRANCISCO* tanker (Exxon). He worked on tug boats and push boats performing "quick" repairs. He worked on the exhaust systems as a welder and tacker. He testified that he worked everywhere on the ship around insulators and pipefitters.

Boudreaux was examined by Dr. Gaziano for the plaintiffs and Dr. Jones for the defendants. Dr. Gaziano diagnosed Boudreaux with asbestosis with a significant but undetermined degree of pulmonary functional impairment. Dr. Jones diagnosed Boudreaux with no asbestos-related conditions and no lung impairment. Dr. Jones's report states that Mr. Boudreaux had normal lung and pleural appearances. Also, his volumes, spiromatic tests, and diffusing capacity were normal.

The jury awarded Mr. Boudreaux $6,800.00. Considering the brevity of his employment, and the conflicting medical reports, the jury award was reasonable and is reinstated. Evidence existed to allow the jury to have concluded that his exposure was not significant and that he was minimally affected by it.

Of the nine settling parties, the jury found against five: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Garlock, and Rock Wool. As noted above, the trial judge's JNOV in favor of Anchor Packing and Garlock is affirmed.

Though he did not specifically mention boilers, Boudreaux's description of his job duties and location supports the finding that he worked in the engine room around the boilers. Therefore, the evidence supports a finding against Babcock & Wilcox and Combustion Engineering for the reasons expressed for Alfred Adams. Likewise, his testimony that he worked around pipe covering and cement, and the evidence that the cement produced serious emissions of dust, is sufficient to support a finding against Rock Wool. The trial court's JNOV in their favor are reversed as to Mr. Boudreaux, and they are returned to his virile share calculation.

OSCAR CHAMPAGNE

The jury awarded Champagne $16,800.00. On JNOV, the trial court increased Champagne's award to $31,800.00. We reverse the trial court's JNOV and reinstate the jury's damage award.

Oscar Champagne was 59 years old at the time of trial. He worked at Avondale from 1967-1973 as a pipefitter helper and pipefitter. He himself did not use any asbestos products, although sometimes he had to cut wallboard and pipe insulation. Mr. Champagne testified that he was exposed to asbestos in his work environment. He worked on the last three Coast Guard cutters and the destroyer escorts.

Some of the products Champagne remembers working around were the half-round pipe insulation, asbestos blankets, asbestos blocks, and gray colored mud. He worked around Hopeman Brothers, who were hanging wallboard; he did not know the name of the board, but did state that it had a veneer.

After leaving Avondale, Mr. Champagne worked in some of the chemical plants on the river. His next major employment was at Good Hope Refinery for a contractor. Some of the job sites had insulation that looked like the same substances as at Avondale.

Mr. Champagne did not know about the dangers of asbestos until sometime in the 1990's, when a friend told him there was testing in Pascagoula. Mr. Champagne was concerned about his diagnosis and was worried about his increased chance of getting cancer both for himself and his family.

Dr. Zimmet examined Mr. Champagne for the plaintiffs in June of 1995. Based on the medical tests and his history of exposure, Dr. Zimmet concluded that Champagne had asbestosis. Mr. Champagne was examined by Dr. Rosenberg for the defendants. Dr. Rosenberg found a moderate amount of bilateral pleural thickening bilaterally consistent with asbestos exposure. Pulmonary function tests performed in his office showed normal lung volumes, with borderline low diffusion. Dr. Rosenberg concluded that the pleural changes were likely due to asbestos exposure, but found no evidence of interstitial lung disease related to asbestos exposure.

Though Champagne worked at Avondale for only 6 years, the defendants' doctors found x-ray evidence of pleural changes consistent with asbestos exposure, and some decreases in the pulmonary function tests, though they disagreed with the plaintiff's doctors on the ultimate diagnosis of asbestosis. The jury concluded that Champagne was affected by asbestos, though apparently not in a major way. The jury's award was reasonable considering the conflicting medical evidence.

Of the nine settling parties, the jury returned findings against six: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Garlock, Rock Wool, and Uniroyal. As noted above, we affirm the trial court's grant of JNOV in favor of Anchor Packing, Garlock, and Uniroyal. As a pipe fitter, Champagne worked in close proximity to insulation, gaskets, and mud, sometimes having to tear them up, which produced dust. Champagne's testimony and the testimony of other pipe fitters supports the jury's findings against Babcock & Wilcox, Combustion Engineering, and Rock Wool. The trial court's JNOVs in their favor are

reversed as to Mr. Champagne, and they are returned to his virile share calculation.

ROGER H. QUAVE

The jury returned a verdict awarding damages in the amount of $12,800.00 to Quave. The trial court in its JNOV increased Quave's award of damages to $27,800.00. We reverse the trial court's JNOV, and reinstate the jury's damage award.

Quave worked at Avondale from 1957 to 1976. He started as a first class outfitter and was eventually promoted to leaderman, foreman, and finally general foreman. In 1965, he became Assistant Superintendent.

Quave was first exposed to asbestos while working at Equitable Shipyard. He worked there on three separate occasions: the first as a pipefitter, the second as a tacker, and the third as a welder. He was exposed to asbestos on all three occasions.

Quave believed that he was also exposed to asbestos while working at Avondale. While working in the engine rooms, he was exposed to asbestos- containing products such as half round pipe insulation, mud, and asbestos cloth. The installation of pipe insulation created a great deal of dust in the work area. Quave remembered such brand names as Kaylo and Ruberoid.

Dr. Lorino examined Quave for the plaintiffs. He diagnosed him with pleural disease, or pleural changes, as a result of his exposure to asbestos. Dr. Grimstad examined Quave for the defendants. He testified that Quave had normal pulmonary function, with changes in his left lung base indicative of chronic inflammation, but no indication of

asbestosis. Dr. David Hunter testified that Quave's x-ray showed an abnormality, but no pleural changes. Chest x-rays from 1994 and 1995 indicate a possible pleural plaque on the left lung.

Based on the conflicting medical evidence, the jury's damage award is reasonable and is reinstated. Evidence exists in the record to allow the jury to have concluded that Quave had been exposed to asbestos but was minimally affected.

Of the nine settling, liable, non-parties, the jury returned findings against 7: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Garlock, Rapid American, Rock Wool, and Uniroyal. As noted above, we affirm the trial court's grant of JNOV in favor of Anchor Packing, Garlock, and Uniroyal. Quave's testimony that he worked in the engine rooms around insulation, asbestos mud, and cement support a finding against Babcock & Wilcox, Combustion Engineering, Rapid American, and Rock Wool for the reasons expressed previously in this opinion regarding these manufacturers. The trial court's JNOVs in their favor regarding Mr. Quave are reversed, and they are returned to his virile share calculation.

ALVIN ROBIN

The jury awarded Mr. Robin $76,500.00. This award was not changed on JNOV. The judgment on appeal is the jury's damage award, not a JNOV. Therefore, this court must consider Mr. Robin's award under the manifest error standard, which is not the same standard under which it must consider the JNOV awards of the other plaintiffs in this group. The discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb

an award of general damages. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La. 1993). Before a trial court award may be set aside as inadequate or excessive, the reviewing court must look first, not to prior awards, but to individual circumstances of the instant matter before it. Only after an analysis of the facts and circumstances peculiar to the instant case can a reviewing court determine the award is either excessive or inadequate. The reviewing court may not merely look at past awards for similar injuries in the determination of whether the trier of fact abused its much discretion. *Reck v. Stevens,* 373 So.2d 498 (La. 1979).

Mr. Robin was 68 years old at time of trial. He worked at Avondale from 1952 to 1982. He was a welder in the main yard, and worked onboard the vessels. Mr. Robin recalls working on the Delta Lines, DE's, DEG's, Coast Guard Cutters, LASH cargo ships, Lykes cargo ships, and just about every ship on dry dock. His job was to weld pipes. After welding the pipes, the pipes were insulated. Then they would test the boilers with water, and leaks would be identified. The insulation would have to be removed, and he would find the leak and fix it. In this process, he was exposed to half round pipe insulation, asbestos mud, and cloth. Although he worked mostly in the engine room, he also worked "all over the ship."

In 1980, Mr. Robin sought treatment from Dr. Bagnetto for "breathing problems." He was told he had a pulmonary disease. A few weeks later, he was sent to work in the pipe shop in order to get away from the dust and fumes.

Mr. Robin testified that Dr. Mitchell diagnosed him with asbestosis. He was later examined by Dr. Zimmet for the plaintiffs, who told Mr. Robin that he had asbestosis. Dr. Zimmet found bilateral pleural thickening. The defendants'

expert, Dr. Thomas Grimstad, testified that he examined Mr. Robin and reviewed his chest x-rays and pulmonary function tests. Dr. Grimstad noted bilateral pleural plaques on Mr. Robin's chest x-ray, but did not note any interstitial changes. Dr. Hunter found some pleural changes, but not enough to classify as pneumoconiosis, though he felt they could be potentially related to asbestos. A CT scan report on Mr. Robin's chest, dated June 2, 1993, was also admitted into evidence. This report states there are scattered areas of pleural thickening.

At the time of trial, Mr. Robin complained of being short of breath since 1980. He actually sought medical treatment for his breathing problems, whereas most plaintiffs simply sought diagnostic evaluations for this suit and did not require treatment. His Avondale records show that his job was modified due to his breathing problems. Mr. Robin was declared disabled after he was struck by a car in 1982. He had other medical problems, including prostate cancer, kidney stones, and degenerative joint disease in his spine. He also had heart problems for which he took medication.

The evidence shows that Mr. Robin worked for Avondale for 30 years and had breathing problems since 1980, and sought active treatment for his breathing problems. Given this evidence, we affirm the jury's quantum award of $76,500.00.

Of the nine settling, liable, non-parties, the jury returned findings against seven: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Garlock, Rapid American, Rock Wool, and Uniroyal. As noted above, we affirm the trial court's grant of JNOV in favor of Anchor Packing, Garlock, and Uniroyal. Robin testified that he worked mostly in the engine room and was exposed to half round

pipe insulation, asbestos mud, and cloth. When pipes leaked he would have to remove the insulation, cloth, and mud, and weld the leaks. These facts support the jury's findings against Babcock & Wilcox (boilers and asbestos cement), Combustion Engineering (boilers and asbestos cement), Rapid American (pipe insulation emitting dust when removed for repair), and Rock Wool (asbestos cement). The trial court's JNOVs in their favor regarding Mr. Robin are reversed, and they are returned to his virile share calculation.

CONCLUSION

In conclusion, we affirm the trial court's grant of JNOV in favor of Anchor Packing, Armstrong World Industries, Flexitallic, Garlock, and Uniroyal, because the evidence adduced at trial was insufficient and inadequate to establish that these defendants' products were a cause in fact of the plaintiffs' injuries. We have reserved consideration of the correctness of the trial court's JNOV in favor of Babcock & Wilcox, Combustion Engineering, Rapid American, and Rock Wool Manufacturing to a plaintiff specific analysis, because there was evidence upon which the jury could have reasonably based its conclusions that these products were present at Avondale, released asbestos dust into the plaintiffs' work environments, and were a significant contributing cause to the plaintiffs' injuries.

We reverse the trial court's grant of all the JNOVs raising the plaintiffs' damage awards, and reinstate all the jury's damage awards. The jury heard conflicting expert medical evidence on injuries caused by asbestos exposure, from diagnoses of disabling lung diseases to diagnoses of no adverse effects. We acknowledge, as did the trial judge in his Reasons for Judgment, that the jury awards as to most plaintiffs were "on the low side." The jury's quantum

determinations, however, were based upon a reasonable interpretation of the conflicting evidence, and therefore the trial court erred in granting the JNOVs on quantum.

AVONDALE INTERESTS SPECIFIC ASSIGNMENTS OF ERROR

AVONDALE EXECUTIVE OFFICER LIABILITY

Six Avondale employees were sued for breaching the duty allegedly delegated to them by their employer to provide a safe workplace. Referred to in brief as either the "Executive Officers" or the "Avondale Interests," all six were found liable to each of the seven plaintiffs germane to this opinion. Each executive officer appealed, generally arguing that either Avondale did not delegate the duty for safety to him and/or that he breached no duty. For the various reasons discussed infra, we affirm as to some and reverse as to others.

LAW ON CO-EMPLOYEE LIABILITY[36]

Every employer has a statutory duty to provide its employees with a reasonably safe work place, including the furnishing and use of safety devices and safeguards. The employer is duty bound to adopt and utilize such methods and processes that are reasonably adequate to render the work place safe in accordance with accepted practices in the same or similar industries. LSA- R.S. 23:13.

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[36] Our discussion is limited to the law applicable prior to October 1, 1976 when the Louisiana Worker's Compensation law was amended to specifically prohibit negligence suits against Executive Officers for work- related injuries. Thus, our inquiry is limited to the actions of the Executive Officers prior to that date.

The defendants in this case rely on *Canter, Pisciotta v. Allstate Ins. Co.*,[37] *Lytell v. Hushfield*,[38] and *Brown v. White*,[39] arguing either that there was no breach of a duty, or that they were not delegated a duty, or their duties were of a general administrative nature and thus not personal to the plaintiffs.

The seminal case of *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973), holds that this statutory duty to provide a safe workplace may be delegated to an employee and that employee may be held liable to a co-employee for a breach of that duty. *Id.* However, the employee to whom the duty was delegated cannot be held liable to co-employees because of the general responsibility delegated; rather, to be held liable this employee "must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages." *Id.* at 721. Thus, the fault of the employee cannot be a technical or vicarious fault but a personal one.

In *Pisciotta v. Allstate Ins. Co.*, three Sears executives approved renovations of a building to be performed during working hours even though these renovations were taking place in close proximity to employees of the catalog department. Plaintiff was injured when several ceiling tiles fell on her. Initially the Court found all three Executive Officers liable for plaintiff's injuries. On rehearing, relying on *Canter,* the Court exonerated two of these Executive

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37 385 So.2d 1176 (La. 1979)

38 408 So.2d 1344 (La. 1982).

39 430 So.2d 16 (La. 1982).

Officers, holding that although they had general responsibility for the safety of employees, they had not breached the duty through personal fault because they had delegated the responsibility of providing a safe workplace to a co-employee.

In *Lytell v. Hushfield,* the plaintiff was injured when he was forced to jump off of the forklift he was driving to escape being crushed by the freight he was transporting. He sued several Executive Officers, including the field safety manager, the dock foreman, the operations manager, and the terminal manager. The Court exonerated the field safety manager because the accident was not caused by his personal fault; rather, he had delegated the duty to provide a safe workplace to the other three Executive Officers. These three men knew of the defects in the forklift plaintiff was driving and did nothing to correct them. The Court found they breached the duty owed to plaintiff through their personal fault.

In *Brown v. White,* the plaintiff was injured while working on a blower. He filed suit against eleven Executive Officers, ten of whom were found not liable. The Court found that the employer's duty to provide a safe workplace was delegated to all eleven Executive Officers, who had the general responsibility to insure overall safety. The Court found that only Evans, the maintenance foreman, was personally liable to plaintiff because he had the specific responsibility to "inform his supervisory personnel of any safety problem made known to him to allow them the opportunity to rectify the situation." The testimony revealed that there were no established procedures for stopping the fan from rotating before working on the blower. Each mechanic was allowed to devise his own method of stopping

the fan. Evans was informed by another employee that the procedure of stopping the rotation with a piece of wood or pry bar was unsafe. Evans was found liable to Brown because he failed to communicate this safety concern to his supervisors. The other supervisory personnel were found not liable since they were not aware of the safety complaints; thus, they breached no duty to Brown.

The plaintiffs rely on *Cole v. Celotex,* 588 So.2d 376 (La. App. 3rd Cir. 1991), to argue that the jury correctly determined the Executive Officers in this case breached a duty owed to plaintiffs. In *Cole,* the Court found it was "the responsibility of the industrial relations department, which answered to the general manager, through its staff, medical doctor and superintendent of safety, to adopt and formulate safety policies." *Id.* at 382. The Court found that the procedures to protect the plaintiffs from asbestos exposure were inadequate and held that the responsibility of a safe workplace "must be that of the top manager, the managers immediately below, the safety department, and the doctors." *Id.* The plaintiffs further argue the duty delegated to the defendants in the case at bar was for overall safety, not just asbestos exposure. They contend that since the Executive Officers failed to protect plaintiffs from injury, we should affirm the jury's finding of liability.

Our inquiry requires a review of the safety responsibility of each executive officer defendant in relation to the risks associated with the presence of asbestos in the work place. After review of the entirety of the evidence relative to those responsibilities, we must determine if the conclusions reached by the jury are reasonable and not manifestly erroneous. Simply, our task is to determine if the record evidence is sufficient to support the finding that each

executive officer breached a standard of care delegated to him to provide a safe workplace for his fellow employees.

GOVERNMENT STANDARDS

The Walsh-Healey Act, enacted in 1951, was the first federal act relevant to safe handling of asbestos. It set a threshold limitation value (TLV) of 5 million parts per cubic foot (mppcf), which was the maximum level of asbestos dust to which a person could be exposed on average throughout his career without any adverse health effect. The act provided that when there was "any doubt concerning the presence of a harmful condition" the employer was required to have air samples taken in the "breathing zone of workers during normal operations." The act required the use of control measures, in the form of substitution of materials if possible, change in work practices (such as the incorporation of "wet methods"), and the use of ventilation when the TLV was exceeded. Walsh-Healey required the use of respirators only when control measures were impractical. The only significant change in Walsh-Healey took place in 1969 when the TLV was lowered to 2 mppcf.

The Occupational Safety and Health Administration (OSHA) asbestos regulations superseded Walsh-Healey on December 31, 1971. These were superseded by a more comprehensive set of asbestos regulations in 1972.

The OSHA regulations were similar to the Walsh-Healey requirements in that they required Avondale to comply with a safe level of asbestos, now referred to as the permissible exposure level (PEL). Control methods were to be used in the event asbestos levels exceeded the PEL. Control measures were essentially the same as those in Walsh-Healey, i.e., wet methods and ventilation. Respirators

were to be used in the event the control measures were ineffective.

There were two significant changes required by the OSHA regulations. First, Avondale was required to conduct its own periodic air sampling to measure asbestos concentrations in the work environment. Second, the PEL was set at 5 fibers per cubic centimeter of air.[40]

DUTIES DELEGATED TO THE DEFENDANTS

James O'Donnell was the head of the Avondale safety department from 1948 until he was replaced by Steven Kennedy on December 13, 1971. Mr. Kennedy remained head of the safety department until August 31, 1973, when John Chantrey took over as department head. It is uncontested that Avondale delegated the duty to comply with government asbestos safety regulations to these three men during the respective time periods each served as head of the department. However, they argue that no reasonable juror could have found them personally liable to any of these seven plaintiffs under the guidelines established in *Canter*. They claim that there is no evidence that they personally knew that these seven plaintiffs were exposed to unreasonable danger as a result of their work with or around asbestos-containing products. Instead, they claim that what was once thought to be "safe" levels of asbestos have now been determined to be unsafe and that these men should not have been judged based on today's knowledge and standards.

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[40] In 1976, the PEL was lowered to 2 fibers per cubic centimeter of air.

The other three Executive Officers named in this lawsuit, Peter Territo, George Kelmell, and J.D. Roberts, were employees who worked in the safety department. Mr. Territo was a safety inspector from 1960 or 1961 until after 1976, Mr. Kelmell worked in the department from 1961 until after 1976, and Mr. Roberts worked in the safety department from 1972 until 1977. Territo, Kelmell, and Roberts deny that they were delegated any duty for asbestos safety.

Of these six defendants, only Mr. Chantrey and Mr. Territo testified at trial. Mr. O'Donnell died in the 1970's, and Mr. Kelmell died in 1993. It is unclear from the record why Kennedy and Roberts did not testify.

Chantrey testified that he was hired in mid-1964 by Avondale as a personnel clerk. He was promoted to assistant personnel director, then assistant personnel and insurance director, then director of personnel benefit programs, and then director of personnel benefit programs and safety in 1972.

Chantrey was responsible for workers' compensation claims starting in 1964. He was aware that there was an occupational disease called asbestosis listed in the State Workers' Compensation Red Manual. Between 1964 and 1972, which was the time he oversaw workers' compensation claims, there were many pneumoconiosis claims at Avondale. Chantrey was not aware of the degree of the asbestos used in the shipyard prior to 1972, but he did know Avondale received claims for pneumoconiosis lung disease. He understood pneumoconiosis to be dust disease.

Chantrey testified that he was the administrator of the safety department from 1973 to 1981. In this position, he was responsible for setting up the safety department and

determining the rules and regulations for the department. Chantrey explained that each geographic area had a safety professional. Mr. Territo was in charge of all of the safety professionals and their performance. Chantrey stated that he did not personally review a specific safety professional's conduct. Rather, Mr. Territo was the actual person who directed the safety personnel and followed up with them. Peter Territo was always safety director while Chantrey was safety administrator.

Chantrey was not aware of what his predecessor, Mr. O'Donnell, did to protect workers from asbestos, silica, or other things. Chantrey further testified that he and Mr. Territo were aware of the OSHA regulations regarding asbestos in 1972. He explained that the safety department took known government rules and regulations and made sure those rules were followed. He agreed that the safety department's job was to find out what was required by the law and then to find out what else needed to be done to insure workers' safety. He agreed that it was his duty to protect the employees of known hazards in addition to those the government had proscribed.

Chantrey agreed that the 1971 OSHA regulations set a standard dust level for asbestos not to exceed 5 fibers per cubic centimeter. He explained that this is accomplished by using local exhaust, vacuuming, and sweeping. He agreed that if the level could not be lowered to the required level, respirators are one of the measures that should be taken. Chantrey agreed that OSHA called for a dust mask when levels are between 25-50 fibers per cubic centimeter and a power filter respirator for levels between 50-250 fibers per cubic centimeter.

Chantrey testified that the respirator program may have already been in effect when he took over as head of the safety department. He was not aware that several plaintiffs testified that this respirator program did not start until the late seventies, almost ten years after OSHA. He was also not aware that several plaintiffs testified that the respirators were almost never required. Chantrey explained that respirators were the second measure to be taken; an effective ventilation system was the first. He stated that Avondale had an elaborate ventilation system that was coordinated by the production department and reviewed by the safety department.

Chantrey agreed that according to OSHA whenever a tear-out or demolition of pipes containing asbestos was done, respirators should have been used. He did not know exactly how Avondale cleaned up asbestos dust, whether it was by vacuum or sweeping. Chantrey admitted that he rarely ever physically went out the shipyard to inspect the area to see if Avondale was complying with OSHA regulations.

During Chantrey's testimony, the 1972 Federal Register OSHA regulations were introduced into evidence. This document was used to show the changes in the OSHA regulations from 1971 to 1972. The 1972 OSHA regulations limited the exposure to airborne concentrations of asbestos dust to 5 fibers per cubic centimeter of air over an 8 hour time weighted average. Additionally, these regulations stated that at no time may the peak concentration of asbestos dust exceed 10 fibers per cubic centimeter of air. Chantrey agreed that this meant that at no point may a worker be exposed to more than 10 fibers per cubic centimeter of air at any time during his work day. Chantrey was not aware of any effort to separate the work involving asbestos from the

work that did not involve asbestos according to the "isolation" standard outlined in the 1972 OSHA regulations. He agreed that the 1972 OSHA standards called for separate clothing for employees who handled asbestos-containing products or worked in an area near asbestos products. He was not aware of the testimony of several plaintiffs stating that no one provided them with special clothing, special lockers, change rooms or laundering. It was Chantrey's position that these procedures were only to be used for individuals whose exposure was at or exceeded the threshold limit.

Documents were introduced to show that testing of airborne asbestos levels was done for the first time at Avondale in December of 1973. Chantrey testified that testing was done every six months in accordance with OSHA. The safety director was directed to contact the insulation department and determine where the asbestos work was being done at the time the testing was scheduled. Several letters were introduced from Central Analytical Laboratory, the laboratory that conducted asbestos testing. These letters were addressed to Chantrey. Each of these letters stated that Avondale was in compliance with the OSHA standards, but noted that very little insulation work was being done at the time of the testing. The letter dated October 31, 1974 stated that of the four work stations only one area was tested. The letter dated June 18, 1975 stated that very little insulation work had been done at the time of monitoring and noted that they only spent one day monitoring instead of the usual two days. The letter dated December 31, 1975 stated that the asbestos dust levels at Avondale were in compliance with OSHA standards and reiterated that during this sampling and previous sampling,

very limited insulation work had been performed. The letter went on to state that it might be advantageous to schedule the next monitoring during a peak insulation period. It was at this point that Chantrey testified that monitoring was scheduled every six months and not necessarily when insulation work was being performed.

While Chantrey was aware that in 1972 that OSHA required signs be posted to show where asbestos work was being performed to allow employees to protect themselves or stay away from the area, he had no personal knowledge of these signs being posted at Avondale. He explained that he understood that these signs were to be posted only when dust exposure was beyond the threshold limit.

The 1972 OSHA regulations also provided that any employee found to have been exposed to airborne concentrations of asbestos fibers be notified in writing no later than five days of the finding. When asked if Avondale practiced this, he responded that he had not received feedback on whether there were any deficiencies in this area.

Chantrey testified that he was not aware of warnings on any asbestos- containing products that were in use at Avondale in the early 1970's. Photographs of several products that were taken in 1972 were introduced. These photographs depicted boxes with warnings stating that the products contained asbestos fibers, and cautioned to avoid breathing the dust. One warning stated that if adequate ventilation was not available, then a respirator should be worn.

During Chantrey's testimony, a report entitled "Asbestos Replacement Materials and Applications in the Shipbuilding and Ship Repair Industry" was introduced. This document

stated that in 1975 Avondale was estimated to be using up to 25,000 yards of asbestos fabrics annually in welding, and discussed possible replacement materials. The report also stated that Mr. Territo had concerns over the long range legal ramifications regarding Avondale's use of asbestos.

Peter Territo testified that he started working at Avondale in 1952 as a time keeper. He started to work in the safety department in 1960 or 1961 and Mr. O'Donnell taught him "how to be a safety man." He explained that O'Donnell was responsible for being aware of the government regulations and implementing Avondale's safety policies. Territo testified that it was never his job to look up government regulations and implement policies. In 1975, Territo became manager of safety services. Even in this position, he testified that he did not have to read the OSHA regulations and develop policies. He further testified that Kelmell did not have to look up the regulations and develop policy. When Roberts came to work in the safety department in the early 70's, he did not have the duty to look up the regulations and develop policy. Territo explained that during the entire period from 1952 until the end of 1976, it was O'Donnell, Kennedy, and Chantrey who were responsible for looking up the regulations and developing policies. However, Territo agreed that while he worked under Chantrey, Chantrey relied on him and Kelmell to be sure OSHA regulations were followed.

When Territo joined the safety department, there were 12 to 14 superintendents of various departments. O'Donnell met with them every week or two and they were responsible for relaying safety information to their departments. Territo and O'Donnell periodically attended the safety meetings between the superintendents and their foreman, but not on a

regular basis. Territo testified that he personally went on the ships and in the engine rooms every day. During the time period the Walsh Healey Act was in effect, he testified that personnel from the Department of Labor inspected Avondale twice per year. He was never informed by any of these inspectors that Avondale was not handling insulation properly. He testified that he was never informed that Avondale received any citations regarding asbestos during the 1960's.

Territo testified that the use of exhaust fans at Avondale started in the mid 60's. The insulators wet the insulation before it was cut to decrease the amount of dust. In 1965, a hood was installed in the insulation shop in response to complaints from insulators that the dust particles would "hurt their noses" and "stick in their throats." During this time, nothing was mentioned about the dust being dangerous. He testified that there was dust floating in the air in the engine rooms, but he never observed the dust clouds described by the plaintiffs. He explained that there was exhaust ventilation in the engine rooms, but there were no local exhaust systems to remove dust from the immediate work space.

Territo testified that although he was not present to observe these procedures being followed, when rip-outs were done in the 1970's the insulation was wet down and respirators were worn. He acknowledged that it "may have been his job" to find out if these procedures were being followed and report to Mr. Chantrey if they were not; however, he did not do this.

Territo testified that in response to the changes in OSHA regulations in the 70's, signs were placed near the areas where asbestos was being used and work areas were isolated

from asbestos work. He denied that in the 1970's testing of asbestos levels was done in areas where insulation was not being performed. Territo testified that they were never told asbestos was dangerous, and if they had been they would have done something about it. Territo denied any recollection of the 1975 document that stated he was concerned about the legal ramification of Avondale's use of asbestos products.

EXPERT TESTIMONY

Dr. John Dement, an expert in the areas of industrial hygiene, epidemiology, asbestos disease and asbestos disease prevention, testified on behalf of the plaintiffs. He explained that diseases caused by asbestos include asbestosis, lung cancer, cancer of the mesothelial lining of the pleural and peritoneum, and gastrointestinal cancer. Lung cancer constitutes the greatest health risk for American asbestos workers. He testified that it was known from 1969 to 1973 that if a man had asbestosis, to allow him to continue to be exposed in a factory that was releasing asbestos dust would continue to injure his lungs.

Dr. Dement testified that asbestos was the first substance that OSHA regulated on an emergency basis. The first regulations were issued in December 1971. At this time, asbestos was considered a very, very serious industrial hazard because asbestos has very poor warning properties. It is too small to see, and it is colorless and odorless. He explained that the Walsh-Healey Act was a law requiring certain safety standards be followed while performing work on government contracts. He stated this act required a facility to have an industrial hygiene program. Dr. Dement explained that asbestosis is a dose related disease and the Act was meant to reduce the amount of asbestos dust in the air

while working. Dr. Dement testified that the presence of visible dust in the air is certainly an indication of a problem. He explained that visible dust in the air begins at dust concentrations in the range of 15 to 20 million particles per cubic foot. He testified that there has been a progressive drop over the years of the safe threshold limit of asbestos dust.

Mr. Danny Joyce was qualified as an expert in industrial hygiene and the regulation and use of asbestos in shipyards. He worked at Avondale from 1980 to 1991. Since leaving Avondale he has worked as a consultant in industrial hygiene.

Mr. Joyce testified that there was a lot of information discovered relative to asbestos in the mid to late 1960's. The TLV was lowered due to the information discovered in the Harris study in 1968, which determined that the Walsh-Healey TLV of 5 parts per cubic foot was not safe.

Mr. Joyce testified that in 1960, when O'Donnell was at Avondale, the Department of Labor would have had no scientific studies available to it suggesting that pipe covering operations created a substantial health hazard. The studies at that time indicated 4-12 fibers per cubic centimeter were not harmful, and that is what the dusty conditions would have reflected in a shipyard.

Mr. Joyce testified that he was working at Avondale during the conversion project of the USS Iowa, a battleship that was "mothballed" after World War II. It was brought to Avondale to be refurbished in order to be put back into commission in the 1980s. This involved removing the old asbestos material. During this process the air was monitored (as per OSHA) as work progressed. They collected

thousands of hours of air samples on a wide variety of asbestos removal operations. After being consulted in this case, he reviewed the information in an attempt to extrapolate what the asbestos levels might have been at Avondale during the '40's, '50's, and '60's.

Mr. Joyce testified that using the data collected during the refurbishment of the USS Iowa, he estimated asbestos levels ranged from 1.9 fibers per cubic centimeter to 13.5 fibers per cubic centimeter. He noted that these levels were well below the accepted safe levels of the 1940s through the 1960s. These levels are also within the first OSHA recommended safe levels of 5 fibers per cubic centimeter and below the 1976 standard of 2 fibers per cubic centimeter. Mr. Joyce testified that these levels reflected the use of good engineering controls in place, such as wet method and exhaust ventilation. He acknowledged that these methods would not have been used in the 1940s-1960s, and agreed that had air sampling been done at during this time period, the levels would have likely been higher.

Mr. Joyce explained that his calculations were derived by using the time weighted average (TWA), which refers to an individual's exposure in an 8 hour day, 40 hour week, extrapolated over a lifetime. He explained that this was a better approach because concentrations of asbestos are seldom consistent throughout the day. TWA takes into consideration the daily peaks and valleys of exposures. TLVs were always based on TWAs. Mr. Joyce testified that according to his research, industrial hygienists during the 40's, 50's, and 60's would have had no reason to think that bystander workers (workers other than insulation) were at any risk from asbestos dust.

Mr. Joyce testified that his research indicated that no citations or warnings were issued to Avondale between 1951 and 1969 regarding violations of the Walsh-Healey Act. He explained that another disciplinary method for a violation of the act was the cancellation of a contract. He found no evidence of canceled government contracts; rather, he saw evidence to the contrary that there was encouragement in the government for contracts to go to Avondale. It was Mr. Joyce's opinion that from 1971-76, Avondale was either in compliance with OSHA regulations or in the process of developing compliance programs as quickly as possible.

TESTIMONY OF THESE SEVEN PLAINTIFFS

Alfred Adams worked at Avondale from 1962 until 1974 as a shipfitter. He testified that he never heard a warning about asbestos from anyone, nor was he ever given a respirator.

Lester Badeaux worked at Avondale from February 1968 until January 1972 and again from July until September 1972. He started as a tacker and moved up to shipfitter. He testified the working conditions were very dusty "with everybody trying to work at the same time." He further testified no one told him to use respiratory protection.

Leroy Bonamour worked at Avondale from 1952-58, 1961-76, 1977-79 and 1980-81. He was a tacker, labelplate installer, test coordinator, and occasionally worked helping other crafts when his area was slow. He sometimes worked in engine rooms where it was very dusty. He explained the other workers cut insulation using a regular saw and the dust would trickle down to his work area. The ventilation systems were inadequate. Mr. Bonamour testified that some workers used air hoses for ventilation, which stirred up the

dust. He testified that he never attended safety meetings that discussed asbestos. He was never offered a respirator during the 17 years he worked at Avondale.

William Boudreaux worked at Avondale for a total of 27 months between 1968 and 1976. He worked as a tacker and welder, which put him near insulators and pipefitters. He testified that he never received any warnings or attended any safety meetings regarding asbestos.

Oscar Champagne worked at Avondale from 1967 until 1973, first as a pipefitter helper, then as a pipefitter. He testified that his working conditions were very dusty and there were a few blowers blowing the dust around. He first became aware of the dangers of asbestos in the early 1990's.

Roger Quave testified that he worked at Avondale from 1957 until 1976. He started as a first class outfitter and was eventually promoted to leaderman, foreman, and general foreman. In 1965 he became an Assistant Superintendent. He testified that when he worked in the engine rooms the installation of pipe insulation created a great deal of dust. He was never warned that asbestos could cause lung disease.

Alvin Robin testified that he worked at Avondale from 1952 until 1982 as a welder. He worked in the engine room and other areas of the ship. Sometimes after the pipes were insulated, leaks would be identified and the insulation would have to be removed in order to fix the leak. In this process he was exposed to a lot of asbestos dust. When he returned home from work in the evenings, he changed his clothes in an outside shed because they were covered with dust.

LIABILITY OF THE EXECUTIVE OFFICER DEFENDANTS RELATIVE TO THESE PLAINTIFFS

O'Donnell, Chantrey, and Kennedy acknowledge (in brief) that they were delegated the duty to comply with the government regulations regarding asbestos safety, but claim the jury committed manifest error in finding them liable. We disagree.

During the entire tenure of O'Donnell, the Walsh-Healey Act was in effect. While the Walsh-Healey Act did not require Avondale to measure asbestos dust levels on a periodic basis, the act did require levels be measured if there was any indication the established levels were being exceeded. Every plaintiff who testified described the dusty conditions at Avondale. Dr. Dement testified that the presence of visible dust indicated the levels exceeded those set by Walsh-Healey. Chantrey testified that if there was as much dust in the air as described by plaintiffs, then the levels should have been monitored. The evidence is clear that during O'Donnell's tenure the testing of asbestos dust levels was not performed and it was reasonable for the jury to conclude that those levels could have exceeded Walsh-Healey's requirement at various times. Furthermore, the evidence also suggests that O'Donnell should have been aware that there was a potential for harm from the inhalation of asbestos dust, yet very few, if any, preventative measures were taken during his tenure. And while plaintiffs assert that the standard of care is more than simply complying with government regulations, we need not reach that conclusion because the jury could have reasonably found that the government standards of the time were not followed.

During the time period that Kennedy and Chantrey headed the safety department, the OSHA regulations were in

effect. The documents introduced during Chantrey's testimony revealed that when testing of asbestos levels were finally carried out in 1973 in an attempt to comply with OSHA regulations, the testing was done at a time when there was little asbestos work taking place, making the asbestos dust levels measured unreliable. The evidence indicates that OSHA required the establishment of adequate ventilation and dust removal procedures. OSHA further required the use of respirators if dust levels could not be limited. OSHA also required that work involving asbestos products be separated from work not involving asbestos products, and that separate clothing and changing facilities be provided for workers using asbestos products. The evidence indicates that these regulations were not followed. Further, although Chantrey denied knowledge of warnings on asbestos products in the early 1970's, the evidence was clear that warnings were present on some products; the evidence is equally clear that Avondale's safety directors did not heed or pass the warnings to its personnel. Plaintiffs' testimony shows that Avondale did not warn them of any dangers of asbestos fibers. Additionally, Chantrey testified that while working in the workers' compensation claims department, he knew asbestosis was an occupational disease caused by inhalation of dust. As with O'Donnell, the evidence strongly suggests that during Kennedy and Chantrey's tenure they knew or should have known of the dangers (or at least some of the dangers) of asbestos inhalation, yet there is scant evidence that any protective measures were taken. Furthermore, it was not unreasonable for the jury to conclude that the independent testing required by OSHA was not reliable and that Chantrey knew it was unreliable.

Considering this evidence, as well as the entirety of the record on the issue, we cannot say the jury was clearly wrong with respect to the liability of O'Donnell, Chantrey, and Kennedy for all of the plaintiffs discussed herein, except Lester Badeaux. The evidence clearly shows that Mr. Badeaux stopped working at Avondale in 1972. Thus, there can be no imposition of liability on the part of Chantrey for Mr. Badeaux.

Territo, Kelmell, and Roberts deny that they were delegated any duty relative to asbestos safety. However, Territo testified that it was his duty to be sure there was compliance with the safety regulations. He stated that he went onboard the ships and in the engine rooms on a daily basis to be sure these regulations were followed. He testified that there was dust floating in the air in the engine rooms and explained that although there was ventilation, there was no exhaust to remove the dust from the immediate work space. During Territo's testimony, a document was introduced that indicated that he expressed concern over the long range legal ramifications regarding Avondale's use of asbestos products. Additionally, Chantrey testified that he relied on Territo to be sure the OSHA regulations were carried out. Chantrey also testified that Territo was in charge of all of the safety professionals and their performance, and that it was Territo who directed the safety personnel and followed up with them. We find the evidence sufficient to support the jury's finding that Territo was delegated the specific duty to ensure that Avondale complied with OSHA regulations regarding asbestos use and that he breached that duty. His admitted knowledge of the dangers of asbestos dust, his recognition that it was present, at least in the engine rooms, and the lack of any preventative measures, other than arguably inadequate

ventilation, provides sufficient basis for us to say that there was no manifest error by the jury as to Territo's liability.

On the other hand, the evidence regarding the duties of Kelmell and Roberts is scant. The only evidence presented established that they worked in the safety department during the time these plaintiffs were employed at Avondale.[41] Under the holdings of *Canter, Pisciotta, Lytell,* and *Brown,* this is insufficient to hold these defendants liable to the plaintiffs. There was no proof that Kelmell or Roberts breached a personal duty owed to plaintiffs. Accordingly, the findings of liability on the part of Kelmell and Roberts are reversed as to all plaintiffs.

CONCLUSION

The fact finder has a duty to assess the demeanor and credibility of all witnesses, lay and expert. A reviewing court may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." Where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the reviewing court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO,* 549 So.2d 840, 844 (La. 1989).

For the reasons discussed above, we find the jury had sufficient evidence to support the conclusions reached with respect to O'Donnell, Kennedy, Chantrey, and Territo, with

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[41] The evidence indicates that Lester Badeaux stopped working at Avondale in January 1972 and Roberts did not start working in the safety department until February 1972.

the exception of liability of Chantrey for plaintiff Badeaux. In view of the scant amount of evidence presented with respect to Kelmell and Roberts, we find the jury was clearly wrong in finding that Kelmell and Roberts personally breached a duty owed to these plaintiffs. Accordingly, the finding of liability on the part of O'Donnell, Chantrey, Kennedy, and Territo is affirmed (with the exception of liability of Chantrey with respect to Badeaux), and the finding of liability on the part of Kelmell and Roberts is reversed.

SUMMARY

Regarding the Common Issues, the trial court did not err in cumulating and consolidating cases in forming the 129-plaintiff trial group. Appellants have failed to show concrete examples that the cumulation prejudiced them. The jury's rendering individualized verdicts, exonerating some defendants regarding some plaintiffs, shows that they were able to consider the evidence on an individualized basis.

The trial court issued no partial final judgments in this case. This assignment of error has no merit.

Plaintiffs' causes of action accrued prior to October 1, 1976, and thus they are allowed to sue Avondale Executive Officers in tort under pre-1976 LSA- R.S. 23:1032, if they can show significant exposures to asbestos at Avondale prior to that date, combined with the later manifestation of an injury, as per *Cole v. Celotex,* 599 So.2d 1058 (La. 1992) and *Walls v. American Optical, supra.* We find that all plaintiffs in this group bore their burden of proof in this regard.

For the time period covering this lawsuit (exposures to asbestos prior to 1976), the LHWCA and state workers'

compensation schemes were available to plaintiffs as concurrent remedies. The plaintiffs have elected to proceed under state law, and thus the LHWCA cannot and does not operate to bar their tort suits against Avondale Executive Officers.

The trial court did not limit the defendants' access to evidence and the use of expert witnesses regarding medical issues, contrary to their assertions. Case Management Order No. 1, dated September 21, 1992, allowed the defendants one independent medical examination of each plaintiff, and allowed them to petition the court for additional IMEs under certain conditions. This limitation was acceptable and reasonable in a litigation of this size and complexity. There is no evidence that such petitions were made and denied.

Common Issue Six was abandoned as not being specifically briefed. URCA- Rule 2-12.4.

The court did not err in its allocation of peremptory challenges. Neither did the trial court err in its allocation of time for opening and closing arguments. The record shows that, in fact, each party was able to present its position in the time allotted.

There is no evidence that the appellants were forced to present a joint defense in a compressed time frame. The fact that the jury exonerated some defendants as to some plaintiffs shows that the defendants were not prejudiced in the presentation of their cases.

The trial court did not err in prohibiting testimony and evidence regarding the contingency fee contract between attorney David Nutt and PAS, Inc. for the reasons expressed above in this opinion. Nor did the trial court err in prohibiting the testimony of William Tucker and Walter

Floyd, who were not parties to this suit, and whose examinations were performed by doctors not called as witnesses in this suit. The trial court did not err in allowing plaintiffs' expert witness reports admitted into evidence and used by the jury during deliberations. The reports were admitted under a hearsay exception, and as properly admitted evidence, were available to the jury during their deliberations.

The trial court did not allow plaintiffs' counsel to testify. Counsels' complained-of conduct occurred during the cross examination and fell within the wide latitude permitted within the scope of cross examination.

The trial court erred in allowing the introduction of certain post-1976 evidence during the testimony of Danny Joyce. The evidence of Avondale OSHA citations in the 1990s was irrelevant and prejudicial to the defendants, besides being hearsay. However, Joyce was afforded ample opportunity to rebut this evidence on redirect examination, rendering the error harmless. Likewise, the trial court did not err in excluding the proffered evidence, as Mr. Joyce's redirect examination was satisfactorily rehabilitative.

The jury was properly instructed on the products liability theory of "unreasonably dangerous per se," as this substantive law was in effect at the time these suits concern, pre-1976, as per *Halphen v. Johns-Manville Sales Corp., supra.* The evidence at trial did not warrant ACL's jury instruction regarding the defenses of sophisticated user and sophisticated purchaser.

The trial court's *Canter* charge on executive officer liability adequately reflected the law applicable to this case, and thus it was not error. In addition, the trial court's failure

to charge the jury with the Avondale Interests' proposed charge regarding compliance with statutory regulations was not error. The charge the court actually gave adequately instructed the jury about the law on that issue.

We find that the jury verdict forms were not misleading. The verdict forms are not inconsistent with the products liability law in effect for this suit (pre-LPLA).

The trial court erred in failing to count Johns-Manville as a virile share for those plaintiffs to whom the jury found it liable. Counting Johns-Manville as a virile share does not offend the Johns-Manville Settlement Trust's provisions for pro rata states, which Louisiana is under its pre-comparative fault law applicable to this case.

While we find the trial court's discovery sanction against ACL excessive, we decline to find it reversible error because ACL was afforded a remedy, the proffer of the disputed evidence as directed by this court in Writ Application No. 95-C-722, and ACL did not avail itself of this remedy. The sanction, the presumption of exposure to ACL's asbestos fiber, relieved the plaintiffs of the burden of proving that ACL supplied the asbestos that was incorporated into products used at Avondale. Since ACL did not avail itself of the opportunity to proffer the disputed evidence, we decline to disturb the discovery sanction and the evidentiary consequences that followed. We find the record contains sufficient evidence to find ACL committed fraud, through its participation in QAMA.

To determine causation in asbestos cases, this court finds a plaintiff must show, by a preponderance of the evidence, that he was exposed to asbestos from defendants' products and that he received an injury that was substantially

caused by that exposure, following *Quick v. Murphy Oil,* 93-2267 (La. App. 4th Cir. 9/20/94), 643 So.2d 1291. We find no justification under the facts of this case for the departure from accepted traditional tort principles applicable in cases where there are multiple defendants.

Considering the JNOVs as to the settling parties' virile shares and the plaintiffs' damage awards, we find that the trial court was correct in granting JNOV in favor of Anchor Packing, Armstrong World Industries, Flexitallic, Garlock, and Uniroyal, because the evidence was insufficient to establish that these manufacturers' products were a substantial cause of any plaintiff's injuries. We reserve consideration of the JNOV in favor of Babcock & Wilcox, Combustion Engineering, Rapid American, and Rock Wool Manufacturing, however, to a plaintiff specific analysis, because though the record contains sufficient evidence that these manufacturers' products substantially contributed to the asbestos dust in the working environment at Avondale, not every plaintiff's work history reflects exposure to each of these products.

We reverse the JNOVs that raised the plaintiffs' damage awards, and reinstate the jury's damage awards. The jury heard conflicting expert medical testimony on each plaintiff that differed widely in diagnoses, from asbestosis to no asbestos effects for the same plaintiff. The jury's damage awards reflect a reasonable interpretation of the widely divergent evidence they heard, and the trial court erred in overturning them on JNOV.

We find the evidence amply proved that Avondale Executive Officers James O'Donnell, Steven Kennedy, John Chantrey, and Peter Territo herder had been properly delegated the personal, legal duty to provide a safe

workplace for the plaintiffs, and breached that duty. We therefore affirm that part of the trial court's judgment. The evidence was lacking, however, regarding George Kelmell and J.D. Roberts, and we must reverse the jury's finding them liable to each plaintiff. This court will consider the liability of O'Donnell, Kennedy, Chantrey, and Territo per each plaintiff. In this group, we find that the evidence supports the jury's finding each of these four Executive Officers liable to each plaintiff in this group, with the exception of Lester Badeaux, who left Avondale prior to Chantrey's assumption of his duties. Accordingly, Badeaux's verdict against Chantrey is reversed.

EXPLANATION OF VIRILE SHARE CALCULATIONS

Since we have changed the number of defendants cast in judgment and have reversed the grant of JNOVs in favor of some settling defendants, we are required to make adjustments in the virile share calculations of each plaintiff's judgment, and render amended judgments. Below is an explanation of how we arrived at the amended judgments set forth in our decree. We do not include in the judgment decrees those defendants who settled after trial (Westinghouse, Owens Corning, Pittsburgh Corning, National Gypsum, GAF Corp./Ruberoid, and A.P. Green Industries).

Alfred Adam—The amount of the amended judgment set forth in our decree ($3,197.35) represents five virile shares at $639.47 per share. This amount was determined by the following calculation. The jury found 10 defendants liable: Westinghouse, Pittsburgh Corning, Owens Corning, Asbestos Corporation Limited, and the six Avondale Executive Officers; and found sixteen (16) settled

manufacturers liable: Anchor Packing, A.P. Green Industries, Armstrong World Industries, Babcock & Wilcox, Combustion Engineering, Fibreboard Corporation, Flexitallic, GAF Corporation/Ruberoid, Garlock, Johns Manville, National Gypsum Corporation, Owens Illinois, Rapid American, Rock Wool Manufacturing, Uniroyal, and UNR (UNARCO); for a total of 26 virile shares. We subtract two shares for Kelmell and Roberts (Avondale Executive Officers whose liability was reversed on appeal by this court), and five shares for the JNOVs that we affirm in favor of Anchor Packing, Armstrong, Flexitallic, Garlock, and Uniroyal, leaving a total of 19 virile shares. The jury's damage award of $12,150.00 divided by 19 equals $639.47 per virile share.

Lester Badeaux—The amount of the amended judgment set forth in our decree ($1,500.00) represents four virile shares at $375.00 per share. This amount was determined by the following calculation. The jury found thirteen (13) defendants liable: Westinghouse, GAF Corporation/Ruberoid, National Gypsum Corporation, A.P. Green Industries, Pittsburgh Corning, Owens Corning, Asbestos Corporation Limited, and the six Avondale Executive Officers; and found nine (9) settled manufacturers liable: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Fibreboard Corporation, Garlock, Johns-Manville, Rock Wool Manufacturing, Uniroyal, and UNR (UNARCO); for a total of 22 virile shares. We subtract three shares for George Kelmell, J.D. Roberts, and John Chantrey (Avondale Executive Officers whose liability was reversed on appeal by this court), and three shares for the JNOVs that we affirm in favor of Anchor, Garlock, and Uniroyal, leaving a total of 16 virile shares. The jury's

damage award of $6,000.00 divided by 16 equals $375.00 per virile share.

Leroy Bonamour—The amount of the amended judgment set forth in our decree ($3,368.40) represents five virile shares at $673.68 per share. This amount was determined by the following calculation. The jury found thirteen (13) defendants liable: Westinghouse, GAF Corporation/Ruberoid, National Gypsum Corporation, A.P. Green Industries, Pittsburgh Corning, Owens Corning, Asbestos Corporation Limited, and the six Avondale Executive Officers; and found eleven (11) settled manufacturers liable: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Fibreboard Corporation, Garlock, Johns-Manville, Owens- Illinois, Rapid American, Rock Wool Manufacturing, Uniroyal, and UNR (UNARCO); for a total of 24 virile shares. We subtract two shares for Kelmell and Roberts (Avondale Executive Officers whose liability was reversed on appeal by this court), and three shares for the JNOVs that we affirm in favor of Anchor Packing, Garlock, and Uniroyal, leaving a total of 19 virile shares. The jury's damage award of $12,800.00 divided by 19 equals $673.68 per virile share.

William E. Boudreaux—The amount of the amended judgment set forth in our decree ($2,000.00) represents five virile shares at $400.00 per share. This amount was determined by the following calculation. The jury found thirteen (13) defendants liable: Westinghouse, GAF Corporation/Ruberoid, National Gypsum Corporation, A.P. Green Industries, Pittsburgh Corning, Owens Corning, Asbestos Corporation Limited, and the six Avondale Executive Officers; and found eight (8) settled manufacturers liable: Anchor Packing, Babcock & Wilcox,

Combustion Engineering, Fibreboard Corporation, Garlock, Johns-Manville, Rock Wool Manufacturing, and UNR (UNARCO); for a total of 21 virile shares. We subtract two shares for Kelmell and Roberts (Avondale Executive Officers whose liability was reversed on appeal by this court), and two shares for the JNOVs that we affirm in favor of Anchor Packing and Garlock, leaving a total of 17 virile shares. The jury's damage award of $6,800.00 divided by 17 equals $400.00 per virile share.

Oscar Champagne—The amount of the amended judgment set forth in our decree ($4,941.20) represents five virile shares at $988.24 per share. This amount was determined by the following calculation. The jury found thirteen (13) defendants liable: Westinghouse, GAF Corporation/Ruberoid, National Gypsum Corporation, A.P. Green Industries, Pittsburgh Corning, Owens Corning, Asbestos Corporation Limited, and the six Avondale Executive Officers; and found nine (9) settled manufacturers liable: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Fibreboard Corporation, Garlock, Johns Manville, Rock Wool Manufacturing, Uniroyal, and UNR (UNARCO); for a total of 22 virile shares. We subtract two shares for Kelmell and Roberts (Avondale Executive Officers whose liability was reversed on appeal by this court), and three shares for the JNOVs that we affirm in favor of Anchor Packing, Garlock, and Uniroyal, leaving a total of 17 virile shares. The jury's damage award of $16,800.00 divided by 17 equals $988.24 per virile share.

Roger H. Quave—The amount of the amended judgment set forth in our decree ($3,368.40) represents five virile shares at $673.68 per share. This amount was determined by the following calculation. The jury found thirteen (13)

defendants liable: Westinghouse, GAF Corporation/Ruberoid, National Gypsum Corporation, A.P. Green Industries, Pittsburgh Corning, Owens Corning, Asbestos Corporation Limited, and the six Avondale Executive Officers; and found eleven (11) settled manufacturers liable: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Fibreboard Corporation, Garlock, Johns Manville, Owens Illinois, Rapid American, Rock Wool Manufacturing, Uniroyal, and UNR (UNARCO); for a total of 24 virile shares. We subtract two shares for Kelmell and Roberts (Avondale Executive Officers whose liability was reversed on appeal by this court), and three shares for the JNOVs that we affirm in favor of Anchor Packing, Garlock, and Uniroyal, leaving a total of 19 virile shares. The jury's damage award of $12,800.00 divided by 19 equals $673.68 per virile share.

Alvin Robin—The amount of the amended judgment set forth in our decree ($20,131.60) represents five virile shares at $4,026.32 per share. This amount was determined by the following calculation. The jury found thirteen (13) defendants liable: Westinghouse, GAF Corporation/Ruberoid, National Gypsum Corporation, A.P. Green Industries, Pittsburgh Corning, Owens Corning, Asbestos Corporation Limited, and the six Avondale Executive Officers; and found eleven (11) settled manufacturers liable: Anchor Packing, Babcock & Wilcox, Combustion Engineering, Fibreboard Corporation, Garlock, Johns-Manville, Owens- Illinois, Rapid American, Rock Wool Manufacturing, Uniroyal, and UNR (UNARCO); for a total of 24 virile shares. We subtract two shares for Kelmell and Roberts (Avondale Executive Officers whose liability was reversed on appeal by this court), and three shares for

the JNOVs that we affirm in favor of Anchor Packing, Garlock, and Uniroyal, leaving a total of 19 virile shares. The jury's damage award of $76,500.00 divided by 19 equals $4,026.32 per virile share.

DECREE:

ALFRED ADAMS

The trial court's judgment of December 9, 1996 is REVERSED IN PART AND AFFIRMED IN PART. We REVERSE the JNOV as to quantum and reinstate the jury's damage award of $12,150.00; we REVERSE the finding of liability as to George Kelmell and J.D. Roberts; we REVERSE the JNOV removing Babcock & Wilcox, Combustion Engineering, Johns-Manville, Rapid American, and Rock Wool Manufacturing from the virile share calculation; in all other respects we AFFIRM the judgment of the trial court.

Pursuant to the above findings, IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of Alfred Adams and against Asbestos Corporation Limited, James O'Donnell, Steven Kennedy, John Chantrey, and Peter Territo in the amount of $3,197.35, including legal interest from date of judicial demand and all costs, including costs of appeal.

LESTER BADEAUX

The trial court's judgment of December 9, 1996 is REVERSED IN PART AND AFFIRMED IN PART. We REVERSE the JNOV as to quantum and reinstate the jury's damage award of $6,000.00; we REVERSE the finding of liability as to George Kelmell, J.D. Roberts, and John Chantrey; we REVERSE the JNOV removing Babcock &

Wilcox, Combustion Engineering, Johns-Manville, and Rock Wool Manufacturing from the virile share calculation; in all other respects we AFFIRM the judgment of the trial court.

Pursuant to the above findings, IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of Lester Badeaux and against Asbestos Corporation Limited, James O'Donnell, Steven Kennedy, and Peter Territo in the amount of $1,500.00, including legal interest from date of judicial demand and all costs, including costs of appeal.

LEROY BONAMOUR

The trial court's judgment of December 9, 1996 is REVERSED IN PART AND AFFIRMED IN PART. We REVERSE the JNOV as to quantum and reinstate the jury's damage award of $12,800.00; we REVERSE the finding of liability as to George Kelmell and J.D. Roberts; we REVERSE the JNOV removing Babcock & Wilcox, Combustion Engineering, Johns Manville, Rapid American, and Rock Wool Manufacturing from the virile share calculation; in all other respects we AFFIRM the judgment of the trial court.

Pursuant to the above findings, IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of and against Asbestos Corporation Limited, James O'Donnell, Steven Kennedy, John Chantrey, and Peter Territo in the amount of $3,368.40, including legal interest from date of judicial demand and all costs, including costs of appeal.

WILLIAM E. BOUDREAUX

The trial court's judgment of December 9, 1996 is REVERSED IN PART AND AFFIRMED IN PART. We REVERSE the JNOV as to quantum and reinstate the jury's damage award of $6,800.00; we REVERSE the finding of liability as to George Kelmell and J.D. Roberts; we REVERSE the JNOV removing Babcock & Wilcox, Combustion Engineering, Johns-Manville, and Rock Wool Manufacturing from the virile share calculation; in all other respects we AFFIRM the judgment of the trial court.

Pursuant to the above findings, IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of William E. Boudreaux and against Asbestos Corporation Limited, James O'Donnell, Steven Kennedy, John Chantrey, and Peter Territo in the amount of $2,000.00, including legal interest from date of judicial demand and all costs, including costs of appeal.

OSCAR CHAMPAGNE

The trial court's judgment of December 9, 1996 is REVERSED IN PART AND AFFIRMED IN PART. We REVERSE the JNOV as to quantum and reinstate the jury's damage award of $16,800.00; we REVERSE the finding of liability as to George Kelmell and J.D. Roberts; we REVERSE the JNOV removing Babcock & Wilcox, Combustion Engineering, Johns-Manville, and Rock Wool Manufacturing from the virile share calculation; in all other respects we affirm the judgment of the trial court.

Pursuant to the above findings, IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of Oscar Champagne and against Asbestos Corporation Limited, James O'Donnell, Steven Kennedy, John Chantrey,

and Peter Territo in the amount of $4,941.20, including legal interest from date of judicial demand and all costs, including costs of appeal.

ROGER H. QUAVE

The trial court's judgment of December 9, 1996 is REVERSED IN PART AND AFFIRMED IN PART. We REVERSE the JNOV as to quantum and reinstate the jury's damage award of $12,800.00; we REVERSE the finding of liability as to George Kelmell and J.D. Roberts; we REVERSE the JNOV removing Babcock & Wilcox, Combustion Engineering, Johns-Manville, Rapid American, and Rock Wool Manufacturing from the virile share calculation; in all other respects we affirm the judgment of the trial court.

Pursuant to the above findings, IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of Roger H. Quave and against Asbestos Corporation Limited, James O'Donnell, Steven Kennedy, John Chantrey, and Peter Territo in the amount of $3,368.40, including legal interest from date of judicial demand and all costs, including costs of appeal.

ALVIN ROBIN

The trial court's judgment of December 9, 1996 is REVERSED IN PART AND AFFIRMED IN PART. We AFFIRM the jury's damage award of $76,500.00; we REVERSE the finding of liability as to George Kelmell and J.D. Roberts; we REVERSE the JNOV removing Babcock & Wilcox, Combustion Engineering, Johns-Manville, Rapid American, and Rock Wool Manufacturing from the virile share calculation; in all other respects we affirm the judgment of the trial court.

Pursuant to the above findings, IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of Alvin Robin and against Asbestos Corporation Limited, James O'Donnell, Steven Kennedy, John Chantrey, and Peter Territo in the amount of $20,131.60, including legal interest from date of judicial demand and all costs, including costs of appeal.

REVERSED IN PART; AFFIRMED IN PART.

THE SUPREME COURT OF THE STATE OF LOUISIANA

DOUGLAS A. ABADIE, ET AL.

VS. No. 2001-C-1534

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

IN RE: Territo, Peter; Kennedy, Steven; London Market Insurers; American Motorist Ins. Co.; Commercial Union Ins. Co.; Highlands Insurance Co.; Travelers Indemnity Co.; O'Donnell, James; Chantrey, John; - Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Jefferson, 24th Judicial District Court Div. J, Nos. 424-010 & other cases; to the Court of Appeal, Fifth Circuit, No. 00-CA-344 THRU 00-CA-856, 00-CA-692

December 14, 2001

Denied.

PFC
CDK
BJJ
CDT

JTK

LOBRANO, J., recused.
VICTORY, J., would grant the writ.

Supreme Court of Louisiana
December 14, 2001

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

THE SUPREME COURT OF THE STATE OF LOUISIANA

DOUGLAS A. ABADIE, ET AL.

VS. No. 2001-C-1543

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

AND OTHER CONSOLIDATED CASES

IN RE: Territo, Peter; London Market Insurers; American Motorist Ins. Co.; Commercial Union Ins. Co.; Highlands Insurance Co.; Travelers Indemnity Co.; O'Donnell, James; - Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Jefferson, 24th Judicial District Court Div. J, Nos. 479-598; to the Court of Appeal, Fifth Circuit, No. 00-CA-352, 00-CA-853, 00-CA-855

December 14, 2001

Denied.

PFC
CDK
BJJ
CDT
JTK

LOBRANO, J., recused.
VICTORY, J., would grant the writ.

Supreme Court of Louisiana
December 14, 2001

/s/ Theophile A. Duroncelet
Chief Deputy Clerk of Court
For the Court

THE SUPREME COURT OF THE STATE OF LOUISIANA

DOUGLAS A. ABADIE, ET AL.

VS. No.2001-C-1544

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

IN RE: Territo, Peter; Kennedy, Steven; London Market Insurers; American Motorist Ins. Co.; Commercial Union Ins. Co.; Highlands Insurance Co.; Travelers Indemnity Co.; O'Donnell, James; Chantrey, John; - Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Jefferson, 24th Judicial District Court Div. J, Nos. 424-010 & other cases; to the Court of Appeal, Fifth Circuit, No. 00-CA-344 THRU 00-CA-856

December 14, 2001

Denied.

PFC
CDK
BJJ
CDT
JTK

LOBRANO, J., recused.
VICTORY, J., would grant the writ.

Supreme Court of Louisiana
December 14, 2001

/s/ Theophile A. Duroncelet
Chief Deputy Clerk of Court
For the Court

THE SUPREME COURT OF THE STATE OF LOUISIANA

DOUGLAS A. ABADIE, ET AL.

VS. No. 2001-C-1629

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

IN RE: Territo, Peter; Kennedy, Steven; American Motorist Ins. Co.; Commercial Union Ins. Co.; Highlands Insurance Co.; Travelers Indemnity Co.; O'Donnell, James; Chantrey, John; - Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Jefferson, 24th Judicial District Court Div. J, Nos. 424-010 & other cases; to the Court of Appeal, Fifth Circuit, No. 00-CA-0344 THRU 00-CA-856

December 14, 2001

Denied.

PFC
CDK
BJJ
CDT
JTK

LOBRANO, J., recused.
VICTORY, J., would grant the writ.

Supreme Court of Louisiana
December 14, 2001

/s/ Theophile A. Duroncelet
Chief Deputy Clerk of Court
For the Court

THE SUPREME COURT OF THE STATE OF LOUISIANA

DOUGLAS A. ABADIE, ET AL.

VS. No. 2001-C-1853

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

IN RE: Territo, Peter; American Motorist Ins. Co.; Commercial Union Ins. Co.; Highlands Insurance Co.; Travelers Indemnity Co.; O'Donnell, James; - Defendant (s); Applying for Writ of Certiorari and/or Review, Parish of Jefferson, 24th Judicial District Court Div. J, Nos. 424-010 & other cases; to the Court of Appeal, Fifth Circuit, No(s). 00-CA-344 THRU 00-CA-856, 00-CA-692

December 14, 2001

Denied.

PFC
CDK
BJJ
CDT
JTK

LOBRANO, J., recused.
VICTORY, J., would grant the writ.

Supreme Court of Louisiana
December 14, 2001

/s/ Theophile A. Duroncelet
Chief Deputy Clerk of Court
For the Court

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 424-010 **DIVISION: "J"**

DOUGLAS R. ABADIE, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Douglas R. Abadie, Leslie D. Anderson, Norman J. Babin, Lester C. Badeaux, Leroy L. Bonamour, Gilbert J. Boudreaux, William E. Boudreaux, Benjamin J. Bourgeois, Lynn G. Bourgeois, Larry J. Breaux, Marvin P. Breaux, Norris J. Bruce, Claude J. Brunet, Lawrence Chaisson, Warren J. Champagne, Wiltz J. Champagne, James A. Clement, Richard J. Clement, Jose F. Cochran, Richard J. Cologne, Jr., Harry J. Comardelle, Charles P. Custard, Connie J. Danos, Raymond A. Dantin, Gerald A. Davis, James O. Davis, Adam M. Decota, James W. Deshotel, George T. Disher, Donald A. Dufrene, Riley D. Dufrene, Allen G. Dugas, Robert W. Dupree, Raymond D. Evans, Walter Falgout, Jessie J. Farve, Willie J. Farve, Jr., Joseph W. Faulk, George C. Fitzgerald, Earlven P. Gauthe, Benny J. Giovingo, Stanley A. Gomez, Alvin Gonzales, Earl J. Guidry, Alva C. Guthrie, Ralph P. Guthrie, Anthony Hebert, Joseph Hensely, Maxwell J. Hinrichs, James Houston, Jr., Lewis T. Ishee, Charles H. Jackson, Johnnie L. Johnson, Kermit J. Kraemer, Jr., Emile J. Landry, Larry L. Landry, Sr., Eric P. LeBlanc, Hyson M. LeBlanc, O.J.

Legendre, Jr., William Lombas, Jr., Melvin C. Manning, Alvin M. Mariani, Nicholas Matrana, Lindsey J. Mazarac, Sr., Donald P. Meacham, Robert C. Murphy, Maurice J. Ockmond, Jr., Kirby Ordoyne, John R. Parker, Melvin R. Parks, Sam A. Pravata, Sr., Kenneth G. Prestenbach, Roger H. Quave, James E. Reech, Alvin Robin, Alvin G. Robin, Michael G. Robin, Melvin C. Sanchez, Claude J. Sieta, Gary J. Stevens, Glen R. Sticker, Jesse L. Tanner, Joseph V. Thibodeaux and Daniel J. Toups.

NUMBER: 433-992 DIVISION "J"

ALFRED J. ADAMS, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Alfred J. Adams, John Byrd, Clarence J. Dufrene, Robert P. Farve, Floyd D. Glass, Randy E. Martinez, Billy McSwain, Kenneth W. Moss (deceased), Angel Palenzuela, Joseph F. Rome, Sr., Emmett D. Smelser, Andrew J. Stauder, Robert J. Stumpf, Oda K. Tate, Jr. and Victor Watson (deceased)

NUMBER: 460-201 DIVISION "J"

TOMMY LEE ADDISON, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Robert W. Campbell, Jr., Bobby Davis Sr., James H. Johnson, Robert Kaigler, Sr., James H. Magee, Clarence J. Mollo, J.C. Rushing and Cleveland J. Thompson, Jr.

NUMBER: 444-648 DIVISION "J"

FELIX R. ALBERT, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Felix R. Albert, Junior J. Chaisson (deceased), John U. Landry, Robert L. Thomas, Sr., James L. Wainwright and Winston M. Whitten, Sr.

NUMBER: 456-354 DIVISION "J"

FRANK ALEXANDER, JR., ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: William Brown, Armond A. Matherne, Lovette D. Mize, Danny Moss, Danny D. Prevost, Wallace Stevens and Gilbert H. Watkins, Jr.

NUMBER: 436-503 DIVISION "J"

JERRY W. BARNES, SR., ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Eugene Edwards, Clifton O. Gunderson and Walter B. Mitchell

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NUMBER: 464-064 DIVISION "J"

ROLLIE BIGNER, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Woodward V. Laird

NUMBER: 426-017 DIVISION "J"

OSCAR J. CHAMPAGNE, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Oscar J. Champagne, Walter Cologne and Samuel J. Rodrigue, Sr.

NUMBER: 479-598 DIVISION "J"

PATRICK HENRY CLARK, deceased and DEANNA MADELINE CLARK

VERSUS

THE McCARTY CORPORATION, ET AL.

FINAL JUDGMENT

These cases came for trial on September 18, 1995, and judgment was entered in accordance with the jury's verdicts on May 14, 1996 in the Patrick Henry Clark case, on May 13, 1996 in all other cases. Posttrial motions were filed by the various parties and came for hearing on June 17, 1996;

PRESENT: John Dillon
Robert Creely
Frank Swarr, Attorneys for plaintiffs;

Michael Cali, Attorney for Owens-Corning Fiberglas;

Janet MacDonell; Attorney for A.P. Green, GAF and Asbestos Claims Management Corporation;

Robert Caraway, Attorney for American Motorists Ins. Co.;

Sam Rosamond, Attorney for Commercial Union Ins. Co.;

Rebecca Bush
Tyson Shofstahl, Attorneys for Foster Wheeler;

Sue Kohn, Attorney for the McCarty Corp.;

Ricard Bridges, Attorney for Pittsburgh-Corning;

Leon Gary
William Schuette, Attorneys for Westinghouse Electric Corp.;

After consideration of the evidence, pleadings, argument of counsel, memoranda and written reasons for judgments

IT IS ORDERED, ADJUDGED AND DECREED that

1. The motion for judgment notwithstanding the verdict regarding the liability of nonparties filed by plaintiffs is GRANTED, and it is ordered that in those cases in which Anchor Packing Co., Armstrong World Industries, Inc., Babcock & Wilcox, Combustion Engineering, Flexitallic, Inc., Garlock, Inc., Rapid American, Rock Wool Manufacturing Co., and/or Uniroyal, Inc. were cast in judgment, those nonparties be stricken from the list of those parties proved to be liable to plaintiffs, and that plaintiffs' damage awards shall not be subject to reduction for those nonparties' virile shares.

2. The motion for judgment notwithstanding the verdict regarding damage awards filed by plaintiffs is DENIED in part and GRANTED in part, as set forth in the attached Reasons for Judgment.

3. The motion for judgment notwithstanding the verdict regarding the liability of Johns-Manville filed by plaintiffs is DENIED in part and GRANTED in part, as set forth in the attached Reasons for Judgment.

4. The motion for judgment notwithstanding the verdict regarding the liability of Owens-Illinois filed by plaintiffs is DENIED.

5. The motion to assess attorneys fees against those defendants cast in judgment for fraud filed by plaintiffs is DENIED.

6. The motion for judgment notwithstanding the verdict regarding exposure evidence filed by Westinghouse Electric Corporation is DENIED.

7. The motion for judgment notwithstanding the verdict, or in the alternative, for partial new trial regarding exposure evidence and motion to amend judgment filed by Pittsburgh-Corning Corporation are DENIED.

8. The motion for judgment notwithstanding the verdict regarding exposure evidence filed by Owens-Corning Fiberglas Corporation is DENIED.

9. The motion for judgment notwithstanding the verdict regarding exposure evidence filed by A. P. Green Industries is DENIED.

10. The motion for judgment notwithstanding the verdict regarding exposure evidence filed by GAF Corporation is DENIED.

11. The motion for judgment notwithstanding the verdict regarding exposure evidence filed by Asbestos Claims Management Corporation is DENIED.

12. The motion for judgment notwithstanding the verdict regarding liability evidence filed by the executive officers of Avondale Shipyards is DENIED.

13. The motions for judgment notwithstanding the verdict, or alternatively, for new trial, regarding fraud liability filed by Asbestos Claims Management Corporation, Owens-Corning Fiberglas Corporation and Asbestos Corporation Limited are DENIED.

14. The motion for judgment notwithstanding the verdict, or alternatively, for new trial, regarding proof of fault filed by Asbestos Corporation Limited is DENIED.

15. The motion for judgment notwithstanding the verdict regarding plaintiff Felix Albert filed by executive officers of Avondale Shipyards and their insurers is DENIED.

16. The motion for judgment notwithstanding the verdict regarding plaintiffs who did not testify at trial filed by the executive officers of Avondale Shipyards and their insurers is DENIED.

17. The motion for judgment notwithstanding the verdict regarding proof of "unreasonably dangerous *per se*" liability filed by Owens-Corning Fiberglas Corporation is DENIED.

18. The motion for judgment notwithstanding the verdict or, alternatively, for remittitur regarding damage awards filed by Owens-Corning Fiberglas Corporation is DENIED.

19. The motion for directed verdict and/or judgment notwithstanding the verdict and/or for new trial in the Patrick Henry Clark and Earlven Gauthe cases filed by the executive officers of Avondale Shipyards and their insurers is DENIED.

20. The motion for judgment notwithstanding the verdict, for remittitur or alternatively for new trial in the Patrick Henry Clark case filed by Owens-Corning Fiberglas Corporation is DENIED.

21. The motion for judgment notwithstanding the verdict or, in the alternative, remittitur and/or new trial in the Melvin

Parks and Earlven Gauthe cases filed by Owens-Corning Fiberglas Corporation is DENIED.

22. The motion for judgment notwithstanding the verdict filed by Jim O'Donnell and George Kelmell regarding judgment against decedents, and the motion for judgment notwithstanding the verdict filed by plaintiffs to replace the executive officer insured's with their insurers on the judgment are both MOOT, because the plaintiffs and the executive officers of Avondale Shipyards and their insurers have entered into a stipulation whereby the insurers have admitted their respective coverage of each of the executive officer defendants.

23. The motion for judgment notwithstanding the verdict regarding the Longshore and Harbor Workers Compensation Act barring plaintiffs' claims filed by the executive officers of Avondale Shipyards and their insurers is DENIED.

24. The motion for directed verdict or, alternatively judgment notwithstanding the verdict and reurged exception of no cause of action regarding plaintiffs' wrongful death claims filed by the executive officers of Avondale Shipyards and their insurers are DENIED.

25. The motion for judgment notwithstanding the verdict regarding whether plaintiffs' claims accrued prior to October 1, 1976 filed by the executive officers of Avondale Shipyards and their insurers is DENIED.

26. The motion for directed verdict and/or judgment notwithstanding the verdict filed by John Chantrey and Steven Kennedy and their insurers regarding proof of their safety responsibilities is DENIED.

27. The motion to amend the Preterial Order filed by plaintiffs is DENIED.

28. The motions for judgment notwithstanding the verdict or, alternatively, new trial regarding the liability of

Foster Wheeler, the McCarty Corp., Wayne Manufacturing and Hopeman Brothers, and Steven Kennedy in the Patrick Henry Clark case, filed by Owens-Corning Fiberglas are DENIED.

29. The motion for new trial regarding judgment on Owens-Corning Fiberglas' third party demands in the Patrick Henry Clark case filed by A.P. Green, GAF and Asbestos Claims Management Corporation is DENIED.

30. The motion for judgment notwithstanding the verdict regarding the allocation of shares in the Patrick Henry Clark case filed by Owens-Corning Fiberglas is DENIED.

31. The motion to tax costs filed by plaintiffs is GRANTED, and in accordance with Louisiana Civil Code of Civil Procedure article 1920, this court hereby renders judgment for costs in favor of plaintiffs, and against defendants Owens-Corning Fiberglas, Pittsburgh-Corning Corp., Westinghouse Electric Corp., Asbestos Corporation Ltd., A.P. Green Industries, GAF Corp., Asbestos Claims Management Corporation, and the executive officers of Avondale Shipyards, Peter Territo, John Chantrey, Steven Kennedy, J.D. Roberts, George Kelmell and Jim O'Donnell, and their insurers, American Motorist Insurance Company, Commercial Union Insurance Company, Travelers Insurance Company, Highlands Insurance Company and certain Underwriters of Lloyds, London, in virile shares, the amount of said costs to be determined after a contradictory hearing before this Court to be held not later than thirty (30) days from the date of this Judgment.

32. The motion to tax costs filed by Owens-Corning Fiberglas is DENIED.

33. The motion to tax costs filed by Champion International is GRANTED, and in accordance with Louisiana Code of Civil Procedure, article 1920, this Court hereby renders judgment for costs in favor of Champion

International, Hopeman Brothers, Wayne Manufacturing and the McCarty Corporation, and against plaintiffs, Owens-Corning Fiberglas, Pittsburgh-Corning Corp., Westinghouse Electric Corp., Asbestos Corporation Ltd., A.P. Green Industries, GAF Corp., Asbestos Claims Management Corporation, and the executive officers of Avondale Shipyards, Peter Territo, John Chantrey, Steven Kennedy, J.D. Roberts, George Kelmell and Jim O'Donnell, and their insurers, American Motorist Insurance Company, Commercial Union Insurance Company, Travelers Insurance Company, Highlands Insurance Company and certain Underwriters of Lloyds, London, in virile shares, the amount of said costs to be determined after a contradictory hearing before this Court to be held not later than thirty (30) days from the date of this Judgment.

JUDGMENT RENDERED on this the 9th day of December, 1996.

JUDGMENT READ AND SIGNED on the 9th day of December, 1996.

/s/ Jacob L. Karno
JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 424-010 **DIVISION: "J"**

DOUGLAS R. ABADIE, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Douglas R. Abadie, Leslie D. Anderson, Norman J. Babin, Lester C. Badeaux, Leroy L. Bonamour, Gilbert J. Boudreaux, William E. Boudreaux, Benjamin J. Bourgeois, Lynn G. Bourgeois, Larry J. Breaux, Marvin P. Breaux, Norris J. Bruce, Claude J. Brunet, Lawrence Chaisson, Warren J. Champagne, Wiltz J. Champagne, James A. Clement, Richard J. Clement, Jose F. Cochran, Richard J. Cologne, Jr., Harry J. Comardelle, Charles P. Custard, Connie J. Danos, Raymond A. Dantin, Gerald A. Davis, James O. Davis, Adam M. Decota, James W. Deshotel, George T. Disher, Donald A. Dufrene, Riley D. Dufrene, Allen G. Dugas, Robert W. Dupree, Raymond D. Evans, Walter Falgout, Jessie J. Farve, Willie J. Farve, Jr., Joseph W. Faulk, George C. Fitzgerald, Earlven P. Gauthe, Benny J. Giovingo, Stanley A. Gomez, Alvin Gonzales, Earl J. Guidry, Alva C. Guthrie, Ralph P. Guthrie, Anthony Hebert, Joseph Hensely, Maxwell J. Hinrichs, James Houston, Jr., Lewis T. Ishee, Charles H. Jackson, Johnnie L. Johnson, Kermit J. Kraemer, Jr., Emile J. Landry, Larry L. Landry, Sr., Eric P. LeBlanc, Hyson M. LeBlanc, O.J. Legendre, Jr., William Lombas, Jr., Melvin C. Manning,

Alvin M. Mariani, Nicholas Matrana, Lindsey J. Mazarac, Sr., Donald P. Meacham, Robert C. Murphy, Maurice J. Ockmond, Jr., Kirby Ordoyne, John R. Parker, Melvin R. Parks, Sam A. Pravata, Sr., Kenneth G. Prestenbach, Roger H. Quave, James E. Reech, Alvin Robin, Alvin G. Robin, Michael G. Robin, Melvin C. Sanchez, Claude J. Sieta, Gary J. Stevens, Glen R. Sticker, Jesse L. Tanner, Joseph V. Thibodeaux and Daniel J. Toups.

NUMBER: 433-992 DIVISION "J"

ALFRED J. ADAMS, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Alfred J. Adams, John Byrd, Clarence J. Dufrene, Robert P. Farve, Floyd D. Glass, Randy E. Martinez, Billy McSwain, Kenneth W. Moss (deceased), Angel Palenzuela, Joseph F. Rome, Sr., Emmett D. Smelser, Andrew J. Stauder, Robert J. Stumpf, Oda K. Tate, Jr. and Victor Watson (deceased)

NUMBER: 460-201 DIVISION "J"

TOMMY LEE ADDISON, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Robert W. Campbell, Jr., Bobby Davis Sr., James H. Johnson, Robert Kaigler, Sr., James H. Magee, Clarence J. Mollo, J.C. Rushing and Cleveland J. Thompson, Jr.

NUMBER: 444-648 DIVISION "J"

FELIX R. ALBERT, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Felix R. Albert, Junior J. Chaisson (deceased), John U. Landry, Robert L. Thomas, Sr., James L. Wainwright and Winston M. Whitten, Sr.

NUMBER: 456-354 DIVISION "J"

FRANK ALEXANDER, JR., ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: William Brown, Armond A. Matherne, Lovette D. Mize, Danny Moss, Danny D. Prevost, Wallace Stevens and Gilbert H. Watkins, Jr.

NUMBER: 436-503 DIVISION "J"

JERRY W. BARNES, SR., ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Eugene Edwards, Clifton O. Gunderson and Walter B. Mitchell

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NUMBER: 464-064 DIVISION "J"

ROLLIE BIGNER, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Woodward V. Laird

NUMBER: 426-017 DIVISION "J"

OSCAR J. CHAMPAGNE, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

THIS PLEADING APPLIES TO: Oscar J. Champagne, Walter Cologne and Samuel J. Rodrigue, Sr.

NUMBER: 479-598 DIVISION "J"

PATRICK HENRY CLARK, deceased and
DEANNA MADELINE CLARK

VERSUS

THE McCARTY CORPORATION, ET AL.

REASONS FOR JUDGMENT

This asbestos case involved present and former workers at Avondale Shipyards who brought suit alleging injuries due to their exposure to asbestos dust and asbestos-containing materials in the course of their employment, regardless of their craft or position. Trial commenced on September 18, 1995 and a jury returned a verdict on April 4, 1996. Judgment was entered in accordance with jury's verdicts on May 13 and 14, 1996.

Before this Court are numerous motions, including motions for summary judgment, judgment notwithstanding the verdict and new trial along with several reurged exceptions. The motions were briefed by the parties and argued on June 17, 1996, and supplemental memoranda were subsequently submitted by several parties. After careful review of the evidence, memoranda and argument of counsel, this Court issues the following reasons for judgment on each of these matters:

Applicable Law

Judgment notwithstanding the verdict should be granted when the evidence points so strongly and overwhelmingly in favor of the moving party that reasonable minds could not reach different conclusions, *Seagers v. Pailet*, 656 So. 2d 700 (La. App. 5th Cir. 1995), or where the facts and inferences from the evidence strongly and overwhelmingly point to a conclusion different from that reached by the jury. *Trans-Global Alloy Ltd. v. First National Bank of Jefferson Parish*, 583 So. 2d 443 (La. 1991). It must be established that no reasonable jury could have found as this jury did. *Anderson v. NOPSI*, 583 So. 2d 829 (La. 1991). This is a heavy burden, and the court cannot itself weigh the evidence, *Morgan v. Belanger*, 633 So. 2d 173 (La. App. 1st Cir. 1993), *writ denied*, 634 So. 2d 832 (La. 1993), or judge the credibility of witnesses. *Autin's Cajun Joint Venture v. Kroger Co.*, 637 So. 2d 538 (La. App. 1st Cir. 1994), *writ denied*, 638 So. 2d 224 (La. 1994). The evidence is viewed in the light most favorable to nonmover with all conflicts in the evidence to be resolved in favor of nonmover. *Laing v. American Honda Motor Co., Inc.*, 628 So. 2d 196 (La. App. 2d Cir. 1993), *writ denied*, 635 So. 2d 239 (La. 193).

Louisiana jurisprudence does not favor new trials, especially when there is support for the judgment in the record. *Fletcher v. Langley*, *supra*. However, the Louisiana Code of Civil Procedure does set forth several grounds upon which a new trial may be granted.

Article 1972 provides specific peremptory grounds for a new trial, which include when the verdict or judgment appears clearly contrary to the law and evidence, when important evidence is discovered after the trial, and when there has been jury misconduct. The basic rule applicable to each of these peremptory grounds is that a new trial should

be ordered when the trial judge, exercising his or her discretion, is convinced by his or her examination of the facts that the judgment would result in a "miscarriage of justice." *Tudela v. Broussard*, 581 So. 2d 1068 (La. App. 5th Cir. 1991).

I. Plaintiff's Motion for JNOV Regarding Liability of Settled Parties

Before this Court is a motion for judgment notwithstanding the verdict (JNOV) filed by the plaintiffs regarding the "settled nonparties." Prior to trial, plaintiffs settled with Anchor Packing Co., Armstrong World Industries, Inc., Babcock & Wilcox, Combustion Engineering, Flexitallic, Inc., Garlock, Inc., Rapid American, Rock Wool Manufacturing Co. and Uniroyal, Inc. The jury was given Jury Interrogatory Forms which listed each of these companies as potentially liable parties. The jury uniformly found these "settled nonparties" strictly liable to plaintiffs under the products liability theory of unreasonably dangerous per se. Plaintiffs have moved for a JNOV on the basis that the defendants failed to prove at trial by a preponderance of the evidence that these nonparties' products were unreasonably dangerous per se, and therefore plaintiffs' damage awards should not be reduced for these nonparties virile shares. *See Cole v. Celotex*, 599 So. 2d 1058 (La. 1992).

The elements of a cause of action are fault, causation and damages. *Seals v. Morris*, 410 So. 2d 715, 718 (La. 1982). At trial, it was the defendant's burden to prove liability on behalf of these nonparties in order to benefit from such liability. *See Cole v. Celotex*, *supra*.

A determination of fault under the theory of unreasonably dangerous per se requires a showing that a "reasonable person would conclude that the danger-in-fact of

the product, whether foreseeable or not, outweighs the utility of the product." *Halphen v. Johns-Manville Sales Corporation*, 484 So. 2d 110, 114 (La. 1986).

This Court finds no evidence was introduced by defendants on the danger-in-fact or the utility of any of these nonparties' products or whether these nonparties were in fact the manufacturers of the particular products. Defendants did not introduce any evidence whether these products contained asbestos, whether the product produced dust in normal use, and/or what type of asbestos fibers were used. The defendants have not directed this Court to any evidence proving fault by these nonparties.

The only evidence presented at trial regarding these nonparties or their products was testimony by some plaintiffs that these products were used at Avondale Shipyards and that they were believed to contain asbestos.

This is not sufficient evidence to establish strict liability under the unreasonably dangerous per se theory.

Accordingly, the Court hereby grants plaintiffs' Motion for JNOV in the cases in which Anchor Packing Co., Armstrong World Industries, Inc., Garlock, Inc., Rapid American, Rock Wool Manufacturing Co., and/or Uniroyal, Inc. were cast in judgment, and consequently, plaintiffs' damage awards shall not be reduced by those nonparties' virile shares.

II. Effect of Johns-Manville Personal Injury Settlement Trust

The parties, particularly plaintiffs and OCF, dispute the effect under Louisiana law of Johns-Manville Personal Injury Settlement Trust ("the Trust") in allocating responsibility for payment of plaintiffs' damage awards.

Plaintiffs filed a motion for JNOV seeking a "dollar-for-dollar" reduction of the damage awards, whereas OFC maintains that it and its co-joint tortfeasors are entitled to a full pro rata share reduction for Johns-Manville's liability.

As a result of many years of bankruptcy proceedings involving Johns-Manville, a "Trust Distribution Process" ("TOP") was established. The TOP sets forth specific rules in regards to codefendants' rights to a set-off on the verdict on account of the Manville share.

Plaintiffs cite the cases *Findley v. Falise*, 929 F. Supp. 1 (E. SD N.Y. 1996) and *Brewer v. Fiberboard Corporation*, decision, No.-62081-4 (S. Ct. of the State of Washington, August 31, 1995) to support their position and OCF cites a Pennsylvania state case, *Albert Baker v. A.Cands. Inc., et al.*, to support its position. This Court finds the reasoning contained in the *Findley* and *Brewer* cases to be the most applicable to Louisiana law.

OFC's citation to specific language in the Trust agreement is unpersuasive. There has been no showing that Section "1. Litigation Between Trust Beneficiaries" applies to any of these cases. None of the defendants cast in judgment to plaintiffs have established themselves to be "Trust Beneficiaries," consequently, this litigation has not been shown to be "between trust beneficiaries." Section "2. Co-Defendant Contribution Claims Against the Trust" sets forth the method by which JM's liability will affect a plaintiff's verdict. The Trust provides that the applicable state law of contribution will govern the reduction of verdicts, and Louisiana law provides that the risk of insolvency is borne by solidary co-obligors. La. Civ. Code Ann. art. 1806 (West 1996). In the present case, the risk of insolvency would be the amount of JM's virile share less the amount, if any, actually paid by the JM Trust.

Additionally, Louisiana is not a "pro rata state" as defined by Section 3(c) of the Trust. Section 3(c) defines a "pro rata state" as one in which "total liability is divided equally among all defendants found by the fact finder to be legally responsible tortfeasors, including released parties." In light of LCCP article 1806, Louisiana does not fit into the narrow definition provided by the Trust. Thus, Section 3(c)'s language regarding pro rata reductions does not apply to these cases. Additionally, the Trust specifically provides that "the set-off amount shall be either (a) the Liquidated Trust Payment, or (b) the Trust's pro rata share of the judgment, as provided by [Louisiana] law." In either (a) or (b), the liable defendants are afforded a reduction for the amount paid by the Trust and nothing more.

Of these cases, only plaintiffs Earlven Gauthe and Patrick Clark were actually paid by the Trust prior to trial. Both Gauthe and Clark received $20,000, one-tenth of the Trust's $200,000 value for mesothelioma. Each of the remaining plaintiffs has filed a claim with the Trust, and if future money is paid, the defendants cast in judgment would be entitled to that money in contribution.

Accordingly, this Court hereby grants plaintiffs' motion for judgment notwithstanding the verdict regarding the effect of the JM Trust, and reduces plaintiffs' verdicts only in the amount already received from the Trust, reserving to the defendants cast in judgment any future payments by the Trust in contribution.

III. Motions for JNOV by Manufacturers Cast in Judgment

Defendants Westinghouse Electric Corporation, Owens-Corning Fiberglas, Pittsburgh-Corning, A.P. Green, GAF Corporation and Asbestos Claims Management

Corporation each assert that they are entitled to judgments notwithstanding the verdicts in some or all of these cases on the grounds that, in light of the evidence presented, it was unreasonable for the jury to conclude that some or all of these plaintiffs had been exposed to their respective products such that the exposure contributed a substantial part in bringing about or actually causing or aggravating plaintiffs' injuries. These particular motions address only the issue of causation.[1]

As to each of these defendants, it was not unreasonable that the finder of fact could have reached the specific conclusions reached. Upon careful review of the evidence presented at trial, the Court concludes that when viewed as a whole, there is sufficient evidence to support the jury's findings that exposure to each of these defendant's asbestos-containing product(s) was a substantial contributing cause of plaintiffs' injuries, such that judgments notwithstanding the verdict are not justified. Accordingly, the motions for judgment notwithstanding the verdict filed by Westinghouse Electric Corporation, Owens-Corning Fiberglas, Pittsburgh-Corning, A.P. Green, GAF Corporation and Asbestos Claims Management Corporation regarding causation are denied.

IV. Settled Co-Tortfeasors and Resultant Reduction of Plaintiffs' Verdicts

Several defendants filed motions for directed verdict, judgment notwithstanding the verdict and/or new trial and motions to amend the judgment on the basis that the court incorrectly calculated plaintiffs' verdicts *vis a vis* set-offs for settled co-tortfeasors. The crux of these arguments is that

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[1] As opposed to fault and damages, the other two elements of plaintiffs' causes of action.

the damage awards should be reduced for the shares of all companies found liable by the jury, regardless of whether plaintiffs had actually settled with them or not, merely because the company's name appeared on the jury interrogatory forms.

Because Louisiana law provides that plaintiffs' damage awards are to be reduced by the virile share of all parties proved at trial to be at fault and with which plaintiffs had settled, this Court ordered that the parties jointly prepare jury interrogatory forms which allowed the jury the opportunity to assign liability to each defendant and each company with which the plaintiffs had settled. Although this was done, and each party consented to the form and content of the interrogatory forms upon their submission to the Court, in several cases companies were listed on the forms that in fact had not settled with plaintiffs.

This Court finds that no actual prejudice to any of the defendants in any of these cases resulted from what are essentially isolated and harmless clerical mistakes. Given the timing and sequence of relevant events, no party credibly relied upon disinformation in any way, and certainly not to any party's detriment. This Court will therefore reduce plaintiffs' damage awards, in accordance with Louisiana law, by the virile shares of those settled companies proved at trial to be co-joint tortfeasors.

V. Wrongful Death Claims

The motion by the executive officers of Avondale Shipyards and their insurers reurging the exception of no cause of action and reurging motion for directed verdict or, in the alternative, motion for judgment notwithstanding the verdict with regard to wrongful death claims will be denied for the reasons set forth in this Court's September 26, 1994 denial of a similar exception in the matter entitled *Alfred*

Adams v. Metropolitan Life Insurance Company, writ denied, 94-C-834. See also *Julia Walker Young, et al. v. E.D. Bullard Company, et al., writ denied*, 96-C-552.

VI. Quantum

Plaintiffs have also filed a motion for judgment notwithstanding the verdict (JNOV) on the issue of quantum. Plaintiffs allege in their motion that the jury's damage awards were unreasonably low and/or inconsistent with the evidence and the jury's findings regarding injury.

A JNOV is the proper procedural device for raising an unreasonable damage award. *Daigle v. U.S. Fidelity and Guaranty Insurance Co.*, 655 So. 2d 431, 436 (La. App. 1st Cir. 1995); *Morgan v. Belanger*, 617 So. 2d 897 (La. 1993). When a trial court determines a JNOV is warranted because reasonable persons could not differ the award was abusively low, it must determine the proper amount of damages. In making this determination, the trial court is not bound by the constraints imposed on appellate courts of raising the award to the lowest point reasonably within the discretion afforded that court. Instead, it should render a de novo award based on its independent assessment of damages. *Anderson v. New Orleans Public Service, Inc.*, 583 So. 2d 829, 833-34 (La. 1991).

In this case sixty-six (66) plaintiffs' awards were under $10,000.00. Forty-seven (47) plaintiffs' awards were between $10,000.00 and $25,000.00 and one award was $25,350.00. Four other plaintiffs were awarded $76,500.00, $845,603.00, $2,300,055.00, and $3,678,110.00, respectively.

In each of these cases, the jury found that the plaintiff had suffered an asbestos-related injury as a result of exposure to asbestos. In light of the overwhelming evidence

presented at trial of the insidious and progressive nature of asbestos disease, as well as the need for specific and specialized yearly medical monitoring for the remainder of their lives, the majority of the damage awards were unreasonably low.

This Court looks to the case *Atkinson v. Celotex Corp.*, 633 So. 2d 383 (La. App. 3d Cir. 1994) for guidance in raising the damage awards. In that case, consolidated suits were brought by twelve men who were allegedly exposed to asbestos-containing materials while employed at the Cities Service Refinery. Nine of the men were awarded damages between $20,000 and $40,000. In *Atkinson*, as in the case before us, the jury awarded damages after hearing testimony from lay witnesses and medical experts. Differing medical evidence was presented concerning the nature of and conditions among pleural diseases, asbestosis and cancer. The defendants in *Atkinson*, as the defendants in this case, contested the nature and extent of damages. In addition, many of the plaintiffs alleged a fear of cancer as a compensable item of damages. The defendants attempted to prove that pleural disease or asbestosis does not necessarily increase his risk of cancer developing from these conditions or from asbestos exposure in general. The appellate court found no abuse of discretion in these various awards which were considered on the <u>low</u> side. The plaintiffs and their respective injuries in the case before us are very similar to the plaintiffs in *Atkinson v. Celotex, Corp., supra.*

Accordingly, this Court will grant plaintiffs' motion for JNOV in certain cases and render a de novo award based on its independent assessment of the damages, as set forth in the following summaries.

VII. Remaining Motions for Directed Verdict, JNOV and/or New Trial

As to the remainder of the motions for directed verdict, judgment notwithstanding the verdict and/or new trial (or any combination thereof) filed by both plaintiffs and defendants, it is not unreasonable that a finder of fact could have reached the conclusions reached by this jury. Upon careful review of the evidence presented at trial, the court concludes that when viewed as a whole, there is sufficient evidentiary support for the jury's findings such that directed verdicts, judgments notwithstanding the verdict and/or new trials are neither warranted nor justified. Accordingly, the court denies these remaining motions for directed verdict, judgment notwithstanding the verdict and/or new trial.

VIII. Plaintiffs' Motion for Attorneys Fees

Plaintiffs moved for the award of reasonable attorneys fees against those defendants found liable in fraud. This Court previously ruled on this exact motion prior to trial, denying any award of attorney fees for fraud finding that the Civil Code does not provide for an award of attorney fees for fraud in a tort or product liability cause of action. This Court therefore denies this motion.

This 9th day of December, 1996.

/s/ Jacob L. Karno
JUDGE

DOUGLAS A. ABADIE, ET AL.	NO.00-CA-344 **CONSOLIDATED WITH** 00-CA-345, 00-CA-346,
VERSUS	00-CA-347, 00-CA-348, 00-CA-349, 00-CA-350
METROPOLITAN LIFE INSURANCE COMPANY, ET AL.	00-CA-351, 00-CA-352, 00-CA-353 THROUGH 00-CA-856

ADDRESSING INDIVIDUAL APPEALS:

ALFRED ADAMS	NOS. 00-CA-346, 00-CA-735, AND 00-CA-743
LESTER BADEAUX	NOS. 00-CA-525, AND 00-CA-646
LEROY BONAMOUR	NOS. 00-CA-524, AND 00-CA-617
WILLIAM BOUDREAUX	NOX. 00-CA-522, AND 00-CA-660
OSCAR CHAMPAGNE	NOS. 00-CA-696, AND 00-CA-704
ROGER H. QUAVE	NOS. 00-CA-456, AND 00-CA-645
ALVIN ROBIN	NOS. 00-CA-453, AND 00-CA-639

DENIAL OF REHEARING REQUESTS

The Applications for Rehearing from this Court's Per Curiam Opinion dated March 28, 2001, filed by appellants,

Asbestos Corporation Limited, Avondale Executive Officers and their insurers, and Plaintiffs/Appellees are hereby denied.

Regarding costs of court. Plaintiffs, Owens-Corning and Champion International entered a Joint Stipulation, "that each party would bear its own costs" and "all appeals of the December 9, 1996 Judgment with respect to the ruling granting Plaintiff's and Champion International's Motion to Tax Costs and denying Owens-Corning's Motion to Tax Costs may be dismissed as moot." As set forth in the Joint Proposal of Defendants/Appellants for Organization of Appellate Briefs, appeals on costs were filed because the trial court improperly assessed costs against all defendants cast in judgment for all cases whether or not a particular defendant was a party in a particular consolidated suit. Asbestos Corporation and Avondale Executive Officers were not parties to the stipulation and we find that the stipulation does not affect the trial court's award of court costs against them when they were named defendants cast in judgment in particular suits.

This Court considers the Per Curiam Opinion as precedent for all consolidated cases. Rulings on all common issues are considered final and will not be readdressed in other consolidated cases.

GRETNA, LOUISIANA this 26th day of April, 2001.

/s/ Thomas Daley
JUDGE THOMAS F. DALEY

/s/ Marion Edwards
JUDGE MARION F. EDWARDS

/s/ Robert Lobrano
JUDGE ROBERT L. LOBRANO, PRO TEMPORE

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to--

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be

furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and

the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

(h) Subrogation

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.[1]

33 U.S.C.A. § 933 (West 2001)

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[1] The 1959 Amendments, Pub.L. 86-171, added subsec. (i) and redesignated former subsec. (i) as (h).

LOUISIANA REVISED STATUTES
TITLE 23. LABOR AND WORKERS' COMPENSATION
CHAPTER 10. WORKERS' COMPENSATION
PART I. SCOPE AND OPERATIONS
SUBPART B. LIABILITY OF EMPLOYERS—ELECTION AS TO COVERAGE

§ 1032. Exclusiveness of rights and remedies; employer's liability to prosecution under other laws.

A. (1) (a) Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages are created by a statute, whether now existing or created in the future, expressly establishing same as available to such employee, his personal representatives, dependents, or relations, as against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer

or principal, for said injury, or compensable sickness or disease.[1]

(b) This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.

(2) For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business, or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

B. Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

C. The immunity from civil liability provided by this Section shall not extend to:

(1) Any officer, director, stockholder, partner, or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and

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[1] The 1976 amendment rewrote the section which previously read:
"The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations.
Nothing in this Chapter shall affect the liability of the employer to a fine or penalty under any other statute."

(2) To the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section.

Amended by Acts 1976, No. 147, § 1; Acts 1989, No. 454, § 2, eff. Jan. 1, 1990; Acts 1995, No. 432, § 1, eff. June 17, 1995.

Louisiana Revised Statutes Annotated 23:1032 (West 2001)

LOUISIANA REVISED STATUTES
TITLE 23. LABOR AND WORKERS' COMPENSATION
CHAPTER 10. WORKERS' COMPENSATION
PART I. SCOPE AND OPERATIONS
SUBPART B. LIABILITY OF EMPLOYERS—ELECTION AS TO COVERAGE

§ 1035.2. Claims covered by certain federal laws

No compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Worker's Compensation Act, or any of its extensions, or the Jones Act.[1]

Added by Acts 1989, No. 454, § 2, eff. Jan. 1, 1990.

Louisiana Revised Statutes Annotated 23:1035.2 (West 2001).

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[1] Federal Employer's Liability Act, see 45 U.S.C.A. § 51 et seq.; Longshoremen's and Harbor Worker's Compensation Act, see 33 U.S.C.A. § 901 et seq.; Jones Act (injuries to seamen), see 46 App. U.S.C.A. § 688.

The Bureau of the Budget has advised that there would be no objections to the submission of this legislative proposal to Congress.

Sincerely yours,

Arthur E. Summerfield,
Postmaster General

HARBOR WORKERS-COMPENSATION-THIRD PARTY LIABILITY

For text of Act see p. 426

Senate Report No. 428, June 24, 1959 [To accompany H.R. 451]
House Report No. 239, March 19, 1959 [To accompany H.R. 451]

The Senate Report is set out.

Senate Report No. 428

The Committee on Labor and Public Welfare, to whom was referred the bill (H.R. 451) to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

BACKGROUND OF THE BILL

Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment. This section also reserves to the employee the right to recover damages against third parties causing injury.

However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake"

an injured employee while pursuing a damage suit – those who, in effect, purchase an injured employee's claim for their own monetary advantage.

PURPOSE OF THE BILL

The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation laws. The committee believe that in theory and practice this is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and rights of all who are involved.

Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action. In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. Thus by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible.

The other major provision of the bill relates to the immunization of fellow employees against damage suits. The rationale of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that he might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

The bill as amended by the committee provides greater protection to injured workers and corrects defects in existing law. It carefully protects the interests of all who are involved and balances the equities. The bill as amended has the support of both labor and industry and the endorsement of both the Labor Department and the Bureau of the Budget. The views of the executive agencies are expressed in the letters which follow:

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
Washington, May 1, 1959

HON. LESTER HILL
Chairman, Committee on Labor and Public Welfare,
U.S. Senate, Washington, D.C.

DEAR SENATOR HILL: This is in further response to your request for a report on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act,

with respect to the payment of compensation in cases where third persons are liable.

This bill would amend section 33 of the act, which describes the relative rights of employers and employees under the act when a third party is responsible for an injury which is also compensable under the act. The primary purpose of the bill apparently is to eliminate the present requirement of an immediate election either to take benefits under the act or to pursue a remedy against the third party. Under certain circumstances, it would permit acceptance of compensation benefits and an action by the employee or his representative against the third party. On the other hand, if compensation were accepted without instituting an action against the third party within the period allowed in the bill, the cause of action would be assigned to the carrier after it had given the required notice. Two-thirds of any amount recovered by the carrier in excess of its compensation liability, after the deduction of reasonable expenses, would be payable to the employee or his eligible survivors.

In general, H.R. 451 appears to follow the pattern of the New York workmen's compensation law and would make significant changes with respect to the rights and liabilities of the parties in interest. This Department would not object in principle to what seems to be the primary purpose of the bill. However, it has several features which we find objectionable, for the reasons described in the enclosed comments on H.R. 451. We are enclosing, as a substitute for H.R. 451, suggested language to remedy these defects. Also enclosed is a Ramseyer of the Department's amendment, and an explanation of this proposal.

Time has not permitted us to determine the views of the Bureau of the Budget on the submission of this report.

Sincerely yours

JAMES T. O'CONNELL,
Acting Secretary of Labor

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., May 22, 1959.

HON. LESTER HILL
Chairman, Committee on Labor and Public Welfare,
U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: This is in reply to your letter of April 17, 1959, requesting the views of the Bureau of the Budget on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

As an attachment to its report, forwarded to your committee on May 1, 1959, the Department of Labor has submitted a substitute for H.R. 451 which accomplishes the major purpose of that bill while correcting certain of its features which were found to be objectionable.

The Bureau of the Budget concurs with the views of the Department of Labor and prefers enactment of the substitute bill proposed by that Department instead of H.R. 451.

Sincerely yours,

(Signed) PHILLIP S. HUGHES,
Assistant Director for Legislative Reference

MOTION FILED
APR 12 2002

No. 01-1363

IN THE
Supreme Court of the United States

PETER TERRITO AND STEVEN KENNEDY, *et al.*,

Petitioners,

v.

ALFRED ADAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA FIFTH CIRCUIT COURT OF APPEAL

MOTION OF COOPER/T. SMITH STEVEDORING COMPANY, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Cooper/T. Smith Stevedoring Company, Inc. ("Cooper") hereby respectfully moves, pursuant to S. Ct. R. 37.2, for leave to file a brief *Amicus Curiae* in support of the petition for a writ of *certiorari* filed in this case. Counsel for all of the Petitioners have consented to the filing of the *Amicus Curiae* brief. Counsel for 66 of the 67 Respondents in the case have also consented. However, *Amicus Curiae* is forced to file this motion because counsel for one of the Respondents has withheld consent.* A copy of the proposed brief is attached.

As is more fully explained in the section of the attached brief entitled "Interest of *Amicus Curiae*," Cooper is an Alabama Stevedoring Company that has employed thousands of longshoremen, either directly or through its predecessor entities, over the last forty (40) years in several different states, including the State of Louisiana. In the instant case, the Louisiana appellate court's decision has rendered meaningless the exclusive remedy and exclusive liability provisions that form the cornerstone of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("LHWCA"). This novel and erroneous interpretation of the LHWCA, which the Louisiana Supreme Court has refused to correct, has stripped all longshore employers and co-employees in Louisiana of their federally guaranteed right to immunity from suit in occupational disease cases. As a consequence, *Amicus Curiae* has found itself in the same position as the Petitioners in this case, having to defend numerous mesothelioma and other occupational asbestos

* Only counsel for Respondent Earlven Gauthe (and the heirs of Earlven Gauthe) has withheld consent to *Amicus Curiae's* request to file a brief in support of the petition for writ of *certiorari* in the captioned matter.

disease tort claims that are barred by the LHWCA. Given the large potential judgment value of asbestos disease cases, the high cost of defending them, the problems created by the inherently unfair, decades-long delays typically associated with the filing of asbestos claims, and the plethora of asbestos-related bankruptcies that have been filed by the truly culpable parties all across the country, Cooper and other similarly situated stevedoring companies have been left fighting for their economic survival.

Consequently, *Amicus Curiae* is well positioned to address the questions presented in this case and is uniquely able to assist the Court in determining whether to grant *certiorari*. In particular, the proposed brief of *Amicus Curiae* serves to point out: (1) that in violation of the Supremacy Clause of the U.S. Constitution, the Louisiana court's opinion has effectively vacated a federal statute and federally guaranteed rights and immunities; (2) that allowing a state tort suit against longshore employers or co-employees is contrary to and undermines the purpose of the LHWCA, which was to ensure longshoremen a certain, speedy and inexpensive, no-fault compensation remedy against their employers while, as a *quid pro quo*, guaranteeing employers and co-employees immunity from tort exposure; (3) that the object of the development of the doctrine of concurrent jurisdiction was to allow an election between compensation remedies, not to allow a plaintiff to "opt out" of compensation coverage to pursue a state tort law remedy; and (4) that the decision rendered by the Louisiana courts in this case not only impacts shipyards, but will also have a far reaching impact on stevedoring companies and all others covered by the LHWCA.

Because the issues listed above are relevant to the issue presented in the petition for a writ of *certiorari* and have not previously been brought to the Court's attention,

Amicus Curiae submits that its attached proposed brief will be of assistance to the Court in determining whether to grant *certiorari*. For that reason and in light of the fact that only one of the 67 Respondents has withheld consent to the filing of the proposed brief, Cooper requests that this "Motion for Leave to File Brief *Amicus Curiae*" be granted and that Cooper's proposed "Brief *Amicus Curiae* in Support of Petitioner" be accepted and filed in this matter.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus Curiae,[1] Cooper/T. Smith Stevedoring Company, Inc. ("Cooper"), is an Alabama stevedoring company that has employed thousands of longshoremen, either directly or through its predecessor entities, over the last forty (40) years in several different states, including the State of Louisiana. As was the case with the entire stevedoring industry, for decades, there was no question that Cooper longshoremen who were injured in the State of Louisiana while performing their duties loading or discharging cargo on vessels in navigable waters fell within the scope and coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, ("LHWCA"). As was the case with the entire stevedoring industry, there was also no question that the LHWCA barred Cooper employees from bringing tort suits against Cooper for occupational diseases, and that their remedy was an election of either compensation benefits under the LHWCA, or compensation benefits under the Louisiana Workers' Compensation Act.

Recently, however, through its opinion in the instant case, the Louisiana Fifth Circuit Court of Appeal has unsettled these longstanding legal and economic principles by holding that injured longshoremen, under the guise of an election of remedies, can "opt out" of LHWCA coverage, select a state compensation remedy in its stead, and then pursue state tort actions against their employers for occupational diseases on the theory that the state compensation law in effect at the time of the alleged exposure did not actually cover the longshoremen's claims. This decision by the state intermediate court violates the Supremacy Clause of the U.S. Constitution because it effectively

1. Neither counsel for the petitioners nor counsel for the respondents authored this brief in whole or in part. No person or entity, other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of the brief.

vacates the LHWCA and the rights that the Act guarantees. The state court's ruling directly conflicts with the plain language of the LHWCA and federal case law interpreting the scope and effect of federal immunity statutes, including the LHWCA. It also completely defeats the dual purposes of the LHWCA, which are to ensure that a no-fault compensation remedy is available to all longshoremen against their employers while, as a *quid pro quo*, guaranteeing longshore employers and co-employees immunity from suit.

In addition to these important legal considerations, the state circuit court's opinion, if not rectified, threatens the economic viability of not only the shipbuilding industry, but also the stevedoring industry. The Louisiana appellate court's novel and erroneous interpretation, which the Louisiana Supreme Court has refused to correct, has retroactively stripped all longshore employers and co-employees of immunity from suit in occupational disease cases in Louisiana. As a result, Cooper has found itself in the same position as the Petitioners in this case, having to defend numerous mesothelioma and other serious occupational asbestos disease tort claims that are barred by the LHWCA. Not only do these cases have potentially high judgment values, but they are also very expensive to defend because of the absence of witnesses and documents regarding events that allegedly occurred three to four decades ago. Compounding these problems, which are created by the inherently unfair, decades-long delays typically associated with the filing of asbestos claims, are the plethora of bankruptcies that have been filed by the truly culpable parties in these matters. All of this has left *Amicus Curiae* fighting for its economic survival.[2] Other companies similarly situated to *Amicus Curiae*

2. This Court has previously taken note of the burden imposed upon all litigants in asbestos personal injury litigation. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

face the same financial crisis and ruination. Moreover, the ruling of the Louisiana court in this case sets a dangerous precedent that could open the door for other states to disregard the provisions of the LHWCA and allow longshoremen injured in their jurisdictions to pursue state law tort actions against longshore employers.

Because the Louisiana court's ruling violates the Supremacy Clause, ignores federal law interpreting the scope and effect of the LHWCA, and creates a conflict between Louisiana and other states with respect to the immunity provided by the LHWCA to employers, it should be reviewed and reversed by this Court.

SUMMARY OF ARGUMENT

The Louisiana appellate court erred as a matter of longstanding law in ruling that the LHWCA did not bar the plaintiff shipyard workers' occupational disease tort claims against their co-employees, even though the claims were covered by the LHWCA. The court's ruling was based upon the erroneous premise that the plaintiffs could reject, under concurrent jurisdiction principles, the remedies provided in the LHWCA in favor of state workers' compensation remedies, and then pursue a tort action on the theory that the version of the state compensation statute in effect at the time of the alleged exposures, decades ago, did not actually cover the plaintiffs' claims. Federal law is clear that concurrent jurisdiction only exists between state and federal *compensation* remedies; concurrent jurisdiction does *not* exist between federal compensation and state tort law. The authorization by the Louisiana court of a tort action against the Petitioners violates the exclusive remedy and exclusive liability provisions of the LHWCA, thereby defeating Congress' legislative will.

Congress had a dual objective in passing the LHWCA. First, Congress sought to provide a no-fault compensation remedy for all longshoremen injured on the job. The *quid pro quo* for employers was that while they would be required to pay compensation benefits without regard to fault, they also would have tort immunity. The Louisiana appellate court's ruling is repugnant to, and violative of these principles. Because federal law governs the interpretation of federal immunity statutes and federal law preempts state law when the exercise of state authority conflicts with federal law, the ruling below must yield to federal preemption of the field. Accordingly, the Louisiana appellate court's ruling should be reviewed and reversed by this Court.

ARGUMENT

A. The purpose of the LHWCA

While the form of the LHWCA was a topic of heated debate during the legislative process, the proposal of a uniform federal compensation scheme had the "unqualified support of both the employers and employee representatives."[3] Since its inception in 1927, the Act has barred tort actions by longshoremen against their employers, providing comprehensive compensation coverage instead. 33 U.S.C. § 905(a), which commands that the liability of an employer for compensation benefits ". . . shall be exclusive and in place of all other liability of such employer to the employee" has not been altered since the passage of the original Act.

The purpose of the Act has been recognized and commented upon by the courts. For example, in *Haynes v. Rederi A/S Alladdin*, 362 F.2d 345, 350 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020, 87 S. Ct. 731, 17 L. Ed. 2d 557 (1967), the

3. 1A Benedict on Admiralty § 7 (7th ed. 1994).

United States Court of Appeals for the Fifth Circuit explained the purpose of the LHWCA as follows:

> Suffice it to say that appellant completely misconceives the purpose and function of the Act; the whole theory of the Act, and of similar compensation legislation, is to provide the injured workman with certain and absolute benefits **in lieu of *all* common law damages.** (*Emphasis added*).

A few years later, citing *Haynes*, the Fifth Circuit again discussed the purpose of the Act in *Gaudet v. Exxon Corp.*, 562 F.2d 351, 356 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S. Ct. 2253, 56 L. Ed. 414 (1978):

> The LHWCA was designed to provide an injured employee with certain and absolute benefits in lieu of possible common law benefits obtainable only in tort actions against his employer . . . when an employee begins work for an employer under the coverage of the LHWCA, he is **presumed to have consented to the Act's trade-off of possibly large common law damages for smaller but certain LHWCA benefits.** And by the very act of continuing in employment, he may be assumed to agree that, considering the likelihood of injury and the likely severity of injury within the working conditions he experiences, the benefits offered by the LHWCA in the event of injury are acceptable. (*Emphasis added*).

By pursuing a tort action against Petitioners, the plaintiffs in this case have effectively "broken the deal" that was the cornerstone of the LHWCA, destroying the *quid pro quo* that Congress so carefully created.

This Honorable Court has also commented upon the purpose and intent of the LHWCA. In *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 636, 103 S. Ct. 2045, 2052, 76 L. Ed. 2d 194 (1983), this Court wrote:

> . . . the Act is not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail.

The Act is not a one-way street.

The decision by the Louisiana intermediate court in the case at bar directly contradicts these cases and the purpose and function of the Act. The effect is harmful to both employers and employees. Employers and co-employees are stripped of the limited and predictable liability that the Act contemplated. Employees lose their ability to recover without the expense, uncertainty, and delay that tort actions entail. This is clearly not what Congress intended.

B. Concurrent jurisdiction exists only between federal and state compensation remedies.

When passed in 1927, the LHWCA remedied numerous judicial decisions that had invalidated earlier congressional efforts to delegate authority to the States to provide compensation coverage to workers who were injured upon

navigable waters of the United States. Although the Act appeared to link federal and state law to provide complete coverage for maritime workers, the boundary at which state remedies gave way to federal remedies remained obscure in the years immediately following the passage of the Act. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717, 100 S. Ct. 2432, 2435, 65 L. Ed. 2d 458, 461 (1980). Consequently, injured workers were compelled to make a jurisdictional guess before filing a claim, with the price of error being unnecessary expense at best, and, at worst, foreclosure from the proper forum by statutes of limitation. *Id.*

After a decade and a half of uncertainty created by judicial interpretations that excluded employees falling within a "maritime but local" sphere from LHWCA coverage, this Court, in *Davis v. Department of Labor*, 317 U.S. 249, 254, 63 S. Ct. 225, 228, 87 L. Ed. 246 (1942), *reh'g denied*, 317 U.S. 713, 63 S. Ct. 438, 87 L. Ed. 567 (1943), broadened the jurisprudential scope of the LHWCA. In an attempt to satisfy Congress' intent to provide a sure and certain compensation remedy for longshoremen, this Court acknowledged that the uncertainty engendered by the maritime but local doctrine "defeat[ed] the purpose of the federal act, which [sought] to give . . . hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation, and the state acts . . . which aim[ed] at sure and certain relief for workmen." *Davis*, 317 U.S. at 254, 63 S. Ct. at 228, 87 L. Ed. at 249. As a result, this Court concluded that the border between state and federal compensation schemes should be treated as a "twilight zone," not a distinct line. *Id.*

The creation of the "twilight zone" was a practical solution to a practical problem: how to assure injured waterfront employees the simple, prompt and certain protection of the no-fault workmen's compensation remedy intended by

Congress, in light of judicial interpretations that had excluded employees falling within the "maritime but local" exception from LHWCA coverage. *Peter v. Hess Oil Virgin Island's Corp.*, 903 F.2d 935, 944 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S. Ct. 783, 112 L. Ed. 2d 846 (1991). *Davis* effectively told injured employees that in doubtful cases, they would be assured of workmen's compensation benefits whether they proceeded under state or federal law. *Bethlehem Steel Co. v. Moore*, 335 U.S. 874, 69 S. Ct. 239, 93 L. Ed. 417 (1948). Within this "twilight zone," then, *Davis* established a regime that allows concurrent jurisdiction between federal and state compensation schemes. *Sun Ship*, 447 U.S. at 717, 100 S. Ct. at 2435, 65 L. Ed. 2d at 461.

In *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196, 8 L. Ed. 2d 368 (1962), this Court further overlapped federal and state law coverage for marine workers in finding that the LHWCA covered "all injuries sustained by employees on navigable waters," without regard to whether the locus of an event was "maritime but local" and, hence, within the "twilight zone" where state compensation provisions could apply. *Calbeck*, 370 U.S. at 124, 82 S. Ct. at 1202, 8 L. Ed. 2d at 375. This Court in *Calbeck* interpreted the statutory phrase, "if recovery . . . may not validly be provided by State law", to mean that the LHWCA would cover injuries occurring on navigable waters, a situation in which prior decisions had questioned the availability of a state compensation remedy. This LHWCA coverage for injuries within the "twilight zone" was held to exist whether or not a particular injury was also within the constitutional reach of a state workers' compensation law. *Calbeck*, 370 U.S. at 126-127, 82 S. Ct. at 1203, 8 L. Ed. 2d at 376-377. However, in extending the LHWCA into the "maritime but local" zone, this Court also observed that an injured worker inside the zone was limited by

the Act to an election between state and federal compensation remedies. *Calbeck*, 370 U.S. at 120-124, 82 S. Ct. at 1201-1202, 8 L. Ed. 2d at 373-375. Summarizing, this Court noted:

> Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.

Calbeck, 370 U.S. at 126-127, 82 S. Ct. at 1203-1204.

In 1972, as part of an effort to minimize the need for litigation and increase the importance and adequacy of statutory compensation as the principal method for remedying longshore injuries, Congress amended the LHWCA. The statutory amendment enhanced the benefits available to employees and expanded the Act's coverage beyond traditional navigable waters and into specific adjoining areas "customarily used by an employer in loading, unloading, dismantling or building a vessel." 33 U.S.C. § 903. Congress was aware that modern longshoring techniques involved an increased amount of work on land, and recognized that the availability of compensation should not depend upon the "fortuitous circumstances of whether the injury occurred on land or over water." *Peter*, 903 F.2d at 948 (citing S. Rep. No. 92-1125 at 13; H.R. Rep. No. 92-1441 at 10-11, 1972 U.S. Code Cong. & Admin. News 4708). Congress thus sought to provide a seamless blanket of LHWCA coverage for all longshore injuries. *Peter*, 903 F.2d at 948-949. As a result, § 902 and § 903 of the Act were amended to provide coverage to any person who engaged in maritime employment, including any longshoreman or other person who participated in longshoring operations, together with any harborworkers, such as ship repairmen, shipbuilders, and shipbreakers. Pub. L. No. 92-576, 86 Stat. 1251.

In 1980, this Court, in *Sun Ship*, *supra*, addressed the question of whether the landward extension of the LHWCA's coverage displaced states from applying their own workmen's compensation schemes to land-based injuries that were included in the expanded federal coverage. *Sun Ship* arose in the context of an injured worker who sought to elect state compensation benefits that were more lucrative than the benefits available under the LHWCA. This Court concluded that Congress had not, during the process of amending the LHWCA in 1972, expressed any intent to alter the accepted understanding that federal compensation jurisdiction would coexist with state compensation laws. *Sun Ship*, 447 U.S. at 722, 100 S. Ct. at 2437, 65 L. Ed. 2d at 464. To ensure that every worker has access to a no-fault remedy, this Court ruled that the availability of a federal compensation remedy did not exclude the possibility of a compensation remedy under state law. *Id.*, 447 U.S. at 725, 100 S. Ct. at 2439, 65 L. Ed. 2d at 466.

In 1984, Congress overhauled the LHWCA to provide, in the case of an occupational disease that does not immediately result in an injury or death, that for purposes of the Act, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware of the disease, or should have been aware of it in the exercise of reasonable diligence or by reason of medical advice.[4] In 1984, Congress also added Section 903(e) to the Act to provide that any amounts paid to an employee pursuant to any other workers' compensation law for the same injury for which benefits are claimed under the Act "shall be credited against any liability imposed by [the Act]."[5]

4. This provision is directly applicable in the instant case. The Louisiana appellate court inexplicably chose to ignore this federal statutory directive.

5. This provision contemplates concurrent compensation jurisdiction. It likewise was ignored by the Louisiana appellate court, (Cont'd)

As this statutory history reveals, the central purpose underlying the LHWCA was to create a uniform compensation system that guarantees a longshoreman a no-fault remedy against his employer in exchange for the employer and co-employees being immune from tort liability. Stated another way, state workers' compensation is the only state remedy that can exist concurrently with the LHWCA's compensation remedy. However, in the case at bar, the state court, without any legal basis, impermissibly overrode this federal congressional directive.

C. Because concurrent federal and state jurisdiction under the LHWCA is limited to compensation liability, the Louisiana Appellate Court's ruling violates preemption principles.

In the instant case, the plaintiffs' occupational diseases did not manifest until 1993 or thereafter; consequently, all of the plaintiffs' claims were governed by the post-1984 version of the LHWCA.[6] The Louisiana Court of Appeal, however, ignored the 1984 amendment and ruled, under the auspices of a pre-1984 Louisiana Supreme Court decision, *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976), and under the guise of an election of remedies, that the injured longshoremen could "opt out" of LHWCA coverage in favor of a state compensation remedy. The lower state court committed reversible error by deciding that the plaintiffs could pursue tort suits against Petitioners despite the federal statutory proscription. This ill-

(Cont'd)
which allowed the plaintiffs to pursue tort remedies in lieu of the LHWCA compensation remedy.

6. *See Castorina v. Lykes Bros. S.S. Co., Inc.*, 758 F.2d 1025, 1031 (5th Cir. 1985), *cert. denied*, 474 U.S. 846, 106 S. Ct. 137, 88 L. Ed. 2d 113 (1985).

conceived ruling should be reviewed and reversed because it directly conflicts with federal law and is repugnant to the congressional objectives of the LHWCA.

It is well settled by this Court that state power is preempted by federal legislation where (1) it was the clear and manifest purpose of Congress to do so or (2) the exercise of dual authority is repugnant to the congressional objective. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973). Whether a federal immunity statute applies to a particular claim is an issue of federal law — not state law. *Grantham v. Avondale Industries, Inc.*, 964 F.2d 471, 473-474 (5th Cir. 1993). In determining the scope of a federal statute, if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, the language must be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L. Ed. 2d 246, 252 (1981).

The Louisiana appellate court's authorization of state law tort actions against the Petitioners challenges federal supremacy. The Supremacy Clause of the U.S. Constitution imposes upon state courts a constitutional duty to protect all the substantive rights of the litigants under controlling federal law. *Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 2314, 101 L. Ed. 2d 123 (1988). Under the clause, the relative importance to the state of its own law is not material when a conflict exists with a valid federal law. Any state law that interferes with or is contrary to federal law must yield to laws enacted by Congress. *Felder*, 487 U.S. at 138, 108 S. Ct. at 2307.

In the present case, a preemption analysis necessarily requires consideration of: (1) whether the LHWCA evidences a congressional intent to preempt the entire area, (2) whether the LHWCA is inconsistent with the application of a state tort

remedy so that it would be impossible for the defendant to comply with both federal and state law, or (3) whether the state tort remedy "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" in enacting the LHWCA. *Schneidewind v. A.N.R. Pipeline, Co.*, 485 U.S. 293, 300, 108 S. Ct. 1145, 1150-51, 99 L. Ed. 2d 316 (1988). While Congress has not expressly declared in the LHWCA that it has preempted the states from providing state compensation benefits to workers covered by the Act, it is clear that the exercise of state authority to allow a *tort* remedy, as was allowed by the Louisiana appellate court in the present case, is repugnant to Congressional objectives.

Congress' intent in enacting the LHWCA was to provide injured longshore workers a straightforward no-fault compensation remedy in exchange for limiting the liability of the longshore employer to payment of compensation benefits.[7] The Act has been interpreted to allow concurrent jurisdiction so that longshoremen can choose to receive state compensation benefits if those benefits are more lucrative than LHWCA benefits. However, this does not conflict with congressional intent because the worker still receives a no-fault recovery and the longshore employer and co-employees still enjoy immunity from suit. By contrast, to allow longshore employees to pursue a state tort action deprives them of their no-fault remedy, forces

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7. This is further evidenced by the fact that the LHWCA only provides a set-off for the payment of state compensation. Section 903(e) of the LHWCA provides that "any amounts paid to an employee for the same injury . . . for which benefits are claimed under this chapter pursuant to any other workers' **compensation law** . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. § 903(e). (Emphasis added). It is telling that there is no mention of any credit for benefits claimed under state tort law. Congress chose not to allow an employee covered by the LHWCA to pursue tort claims under state law.

the employees to satisfy the heightened burden of proving negligence as a prerequisite to recovery, exposes the employees to unnecessary legal fees and costs of litigation, and, worst of all, puts the employees at risk of having no remedy if they are unable to prove employer or co-employee negligence. In like fashion, deviating from the LHWCA strips the employer and co-employees of the federally guaranteed right to immunity from suit that is the cornerstone of the LHWCA's compensation scheme, and thereby renders meaningless both the exclusive remedy and the exclusive liability provisions of the LHWCA. The intermediate state court's approach is inconsistent with the LHWCA and "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." The state court's conclusion is, therefore, statutorily preempted. *Schneidewind*, 485 U.S. at 300, 108 S. Ct. at 1150-1151.

The decision of the Louisiana court in this case directly conflicts with the opinions of several federal appellate courts that have found that the post-1984 version of the LHWCA preempts state law tort actions in situations covered by the Act. In *Peter*, 903 F.2d at 950-953, for instance, the Third Circuit, after a detailed analysis, found that a refinery employee who was exposed to jet fuel was barred by federal supremacy principles from pursuing a state law negligence action against his employer because application of the state's law would frustrate the full purposes and objectives of Congress as reflected in the LHWCA. Similarly, although the case involved a tort claim against a third party as opposed to a compensation claim against an employer, the Ninth Circuit ruled in *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1058-1060 (9th Cir. 1997), *cert. denied*, 522 U.S. 1107, 118 S. Ct. 1034, 140 L. Ed. 2d 101 (1998), that a state wrongful death action brought by the heirs of a marine surveyor who was killed in a fall was preempted by the LHWCA. Likewise, the Fifth Circuit in *Perron v. Bell*

Maintenance and Fabricators, Inc., 970 F.2d 1409, 1412-1414 (5th Cir. 1992), held that the LHWCA prohibited a worker's attempt to recover on a state law respondeat superior tort theory from the nominal employer of a co-worker, where the worker and co-worker were borrowed servants of the same employer.

The Louisiana appellate court reasoned that a worker can elect a state compensation remedy in place of one under the LHWCA and then pursue a tort suit against his employer and its executive officers, on the theory that his claim falls outside of the coverage of the state compensation act. This not only defies logic, but conflicts with the entire body of federal jurisprudence defining the scope and effect of the LHWCA. In addition, the lower court's reasoning is internally incongruous. If the state compensation scheme does not apply to the claim, then concurrent compensation jurisdiction does not exist and the longshoreman's remedy falls exclusively within the LHWCA. Because concurrent jurisdiction can not exist between the LHWCA and state tort remedies, the exclusive remedy provisions of the LHWCA bar the plaintiffs' state law tort actions as a matter of law. Accordingly, the Louisiana circuit court's ruling should be reviewed and rectified by this Honorable Court.

CONCLUSION

The Louisiana appellate court committed a serious statutory interpretation error by concluding that the LHWCA did not apply to the plaintiffs' occupational disease tort claims against the Petitioners. If this Court does not correct this ruling, state courts will have the unfettered and arbitrary right to supplant federal law with state enacted remedies. The state court's ruling ignored and contradicted the 1984 amendment to the LHWCA, which specifies as a matter of federal law that in occupational disease cases, the time of manifestation controls the application of the LHWCA. Further, the state court decision was based upon an erroneous finding that the plaintiffs could elect a tort suit, as an alternative to a state compensation remedy, under concurrent jurisdiction principles. Federal law is clear that concurrent jurisdiction only exists between the LHWCA and state compensation remedies; concurrent jurisdiction does *not* exist between the LHWCA and state tort law. The Louisiana court's approval of a tort action against the Petitioners violates the exclusive remedy and exclusive liability provisions of the LHWCA.

Congress' dual objectives in enacting the LHWCA were to provide a no-fault compensation remedy for longshoremen injured on the job in exchange for providing employers and co-employees with immunity from suit. The state court's ruling is repugnant to both of these legislative objectives. The misguided approach of the state court deprives longshore employers and co-employees of the federally guaranteed right to tort immunity. It represents an impermissible override of federal law. Because federal law governs the interpretation of federal immunity statutes and federal law preempts state law when the exercise of state authority conflicts with federal law, the Louisiana court's ruling must yield to federal preemption of the field. Based upon controlling law, a writ of certiorari should

issue to the Louisiana Fifth Circuit Court of Appeal and the ruling below should be reversed by this Honorable Court. Otherwise, the Louisiana state courts will continue to jettison federal laws and essentially re-write Congressional mandates. This Court should explicitly pronounce that federal laws cannot be so cavalierly treated.

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No. 01-1363

In The

Supreme Court of the United States

PETER TERRITO AND STEVEN KENNEDY, *et al.*,

Petitioners,

v.

ALFRED ADAMS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Fifth Circuit Court Of Appeal

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REASONS WHY CERTIORARI SHOULD BE DENIED

The decision below does not create a conflict in the jurisprudence. Assuming a conflict exists, that "conflict" can only be attributed to the Alabama Supreme Court's decision in *Fillinger v. Foster*, 448 So.2d 321 (Ala.), *cert. denied*, 469 U.S. 872, 105 S.Ct. 223 (1984), which chose not to follow *Poche v. Avondale Shipyards*, 339 So.2d 1212 (La. 1976), *appeal dismissed sub nom Territo v. Poche*, 434 U.S. 803, 98 S.Ct. 31 (1977). *Poche* had accurately predicted this Court's ruling in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432 (1980), that the only preemptive effect of the Longshore Harbor Workers' Compensation Act ("LHWCA") is to guarantee a minimum level of recovery to covered employees, a floor which states were free to supplement under their own laws. *See* 447 U.S. at 723-24; 100 S.Ct. at 2438.[1] This Court denied writs in *Fillinger*, as it did in *Logan v. Louisiana Dry Dock*, 541 So.2d 182 (La.), *cert. dismissed*, 492 U.S. 939, 110 S.Ct. 30 (1989), which was Louisiana's post-*Sun Ship* and post-*Fillinger* reaffirmation of *Poche*.[2]

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[1] "In *Poche v. Avondale Shipyards*, the Solicitor of Labor, at the request of the U.S. Supreme Court, filed an *amicus* brief, arguing that the LHWCA was not a bar." T. Thorne, *The Impact of the Longshore and Harbor Workers' Compensation Act on Third Party Litigation*, 68 Tul. L. Rev. 557, 570-571 (1994).

[2] Opponents do not concede that there is a conflict in the jurisprudence. *Sun Ship*'s holding that states are free to supplement LHWCA recovery provides but one method of harmonizing the cases.

> The *Sun Ship* Court upheld the right of states to exercise concurrent jurisdiction over maritime-related injuries covered by the Longshore Act, but it

Neither the petition nor the *amicus* brief provide any convincing impetus for this Court to change course, and review *Poche/Logan*, and *Fillinger* now, by considering the decision of an intermediate Louisiana appellate court following well-established precedent in accord with the view of the majority of commentators, who have concluded that LHWCA does not preempt supplementary state remedies, including exemptions from workers' compensation laws that allow tort recovery in certain circumstances. *See Logan, supra,* 541 So.2d at 185 ("A clear majority of the commentators, however, find concurrent jurisdiction is the better rule for a variety of legal and policy reasons. We agree."). Eighteen years have passed since the alleged conflict arose. In those years, the issue raised in these cases has rarely arisen again,[3] and insurance premiums have been adjusted and paid based

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is up to the individual states whether that right is exercised.

Thomas J. Schoenbaum, *Admiralty and Maritime Law* (1994), Sec. 5-4, at 332 n. 11, citing *Logan v. Louisiana Dry Dock*, 541 So.2d 182 (La. 1989). *Fillinger* and *Poche* simply represent two different states' determinations of whether they have chosen to exercise concurrent jurisdiction and supplement LHWCA recovery.

[3] The petition points to only two other cases which allegedly discuss the issue. *See Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913, 110 S.Ct. 3273 (1993), and *Peter v. Hess Oil*, 903 F.2d 935, 952 n. 17 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067, 112 L. Ed. 2d 846 (1991). In *Peter*, the purported "conflict" between *Fillinger* and *Poche/Logan*, although openly discussed, *see* 903 F.2d at 952 n. 17, was not deemed worthy of *certiorari*. In *Perron*, the court held that Louisiana law did not apply under the terms of the Outer Continental Lands Shelf Act, 43 U.S.C. § 1333(a)(2)(A), because the state and federal rules were

upon the results of both *Poche/Logan* and *Fillinger*. A routine application of the *Poche/Logan* line to Louisiana defendants, who are covered by insurance bought and paid for based upon the possibility of tort liability, is hardly an event that justifies this Court entering the discussion to upset what has now become well-settled rules.[4]

Nor is this Court's intervention necessary to prevent some potential future disruptive development. Ignored by the petition and the *amicus* brief is the fact that the cause of action at issue in these cases – "executive officer" tort liability for supervisory co-employees – is no longer

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different. 970 F.2d at 1413-14. Preemption under LHWCA was not at issue.

[4] *Amicus* disputes that the court below applied a well-established rule, and divines a "novel" feature of its decision in the observation that the concurrent jurisdiction approved in *Sun Ship* allows a state to impose tort liability as a feature of supplemental recovery allowed by its compensation laws, because the plaintiff who foregoes LHWCA recovery in favor of a state plan, may take advantage of the "entirety of that scheme," including its exemptions and immunity rules. *See Abadie v. Metropolitan Ins. Co., et al.*, 784 So.2d 46 (La. App. 5th Cir.) (App. 26). This observation is not novel, and is in fact the precise holding of this Court in *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 79 S.Ct. 266 (1959) (*per curium*) (worker who elected to proceed under state worker's compensation system can sue for negligence where employer refuses to pay compensation and state act allows such a suit). *See, e.g., Lenane v. Continental Maritime of San Diego, Inc.*, 72 Cal. Rptr. 2d 121, 124, 1998 AMC 1130, 1133 (Cal. Ct. App.), *review denied*, 05-20-1998 (Cal.), *cert. denied*, 525 U.S. 1002, 119 S.Ct. 513 (1998) (holding that the exclusive remedy provision of LHWCA does not prohibit a ship repairer who was injured ashore from bringing a tort claim against his employer within the exception to the exclusive liability provision of the California workers' compensation statute).

an exception to Louisiana workers' compensation scheme, and has not been since 1976 when executive officers were granted tort immunity. *See Abadie v. Metropolitan Ins. Co., et al.*, 784 So.2d 46 (La. App. 5th Cir.), *writ denied*, 804 So.2d 642 (La. 2001), discussing LSA-R.S. 23:1032 (eff. Oct. 1, 1976) (App. 16). The only reason for executive officer liability in the cases that are the subject of the petition for *certiorari* is that the claims arose prior to 1976, and were therefore protected by the vested rights doctrine. *See id.* (App. 21-22).[5] Accordingly, in Louisiana at least, prospective "executive officer" suits will not arise to purportedly conflict with the LHWCA. As to other jurisdictions, the petition fails to enumerate the few, if any, states whose laws might "conflict" with the LHWCA by allowing executive officers to be sued in tort.[6]

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[5] Moreover, in 1990, Louisiana adopted a provision that precludes recovery under its compensation laws for any injury covered by the LHWCA. *See* LSA-R.S. 23:1035.2. As the court below observed, "LSA-R.S. 23:1035.2 now divests plaintiffs of the concurrent state and federal remedies" that existed between 1972, when federal relief became available to maritime employees working on land, and 1990, when federal relief became exclusive by operation of Louisiana law. *See Abadie, supra* (App. 25-26).

[6] Opponents do not concede that executive officer liability conflicts with the LHWCA. 33 U.S.C. § 905, which is the "exclusive liability" section of the Act, grants immunity to "employers," a term defined in Section 902(4) as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Co-employee liability is only

The cases below are even less worthy of *certiorari* than *Logan* or *Fillinger*, not only because they represent the tail-end of a now mooted "conflict", but also because the issue allegedly raised by them as identified in the "questions presented" to this Court are not ripe. The petition assumes that the plaintiffs are covered by the LHWCA, but this has never been resolved by any of the lower courts. The plaintiffs argued at every level that there was no proof in the record of this case that they

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mentioned in Section 933(i), which provides that "[t]he right to compensation or benefits *under this Act* shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.") (emphasis added). On its face, that section has no operation in cases which do not arise "under the Act." There is nothing in the LHWCA that purports, either expressly or by implication, to preempt a state law that might allow recovery against co-employees, who do not participate in the quid-pro-quo that allegedly forms the basis of tort immunity. As the Fourth Circuit observed, relying on this Court's decision in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 30 L. Ed. 2d 383, 92 S.Ct. 418 (1971), as one which "left no doubt about the matter," "[t]he third party action, when founded on state law, is a creature of state law and is to be governed entirely by it.*** [In the LHWCA,] Congress has not purported to prescribe the immunity rules to be applied by states in actions brought upon state law claims. The federal immunity rule is to be applied when the third party claim is a federal claim; when the third party claim is a state law claim, the immunity rules of that state are to be applied. The federal and state statutes are readily harmonized, and each may function in its own sphere without interference with the other." *Gavin v. Alumax of South Carolina, Inc.*, 787 F.2d 910, 917-18 (4th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 314 (1986).

were LHWCA-covered employees, a burden which they contended rested upon the defendants. As was stated in the brief filed in the Louisiana appellate court:

> The Avondale Defendants' preemption argument is based upon the assumption that each of the plaintiffs could have received compensation under the LHWCA, and thus could not maintain state law claims. Instead of offering proof of that fact, the Avondale Defendants ask this Court to accept it as true because "each plaintiff failed" to prove to the contrary. *See* Avondale Defendants' Brief, at 14.
>
> But, the Avondale Defendants have misallocated the burden of proof. Preemption is an affirmative defense, and the burden of proof with regard to it belonged to Avondale. *See Walls v. American Optical Corp., supra,* 740 So.2d at 1267-1268 (burden of proof regarding affirmative defense rests upon defendant); *Cooper v. Borden, Inc.,* No. 30,292 (La.App. 2nd Cir. 2/25/98), 709 So.2d 878, 881 (preemption is an affirmative defense).
>
> Since the Avondale Defendants failed to establish each plaintiff's entitlement to LHWCA payments through facts documenting that each plaintiff was covered by that Act, their preemption argument fails on the facts, even if they are correct in their contention about the lack of concurrent remedies under LHWCA and state law.

This issue was pretermitted by the appellate court, which found that "the fact that plaintiffs *may* be classified as longshoremen does not preclude them from bringing a claim in tort under *Poche*." (App. 25) (emphasis added).

The issue raised in the instant application is the same one that was not worthy of review more than twenty years ago, when first raised to this Court. No crisis has emerged as a result of this Court's denial of *certiorari* in *Fillinger* and *Logan*. Instead, these decisions have simply been incorporated into risk management decisions. No future circumstance will require a reopening of the issue, since legislation and jurisprudential developments have effectively mooted the question entirely. The only thing at issue in the petition and the *amicus* brief is whether certain Louisiana executive officers are retroactively provided an absolute defense to a discreet class of cases arising under pre-1976 Louisiana state law. *Certiorari* is not appropriate.

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IN THE

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Petitioners,

v.

ALFRED ADAMS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

Petitioners file this reply brief to respond to three issues raised by Respondents which, as stated by Respondents, mislead this Court. First, as discussed below, the passage of time has not eliminated the impact of the issue before this Court. Because these claims are based on latent diseases that appear decades after the Respondents' employment at the Avondale shipyard and other workplaces, new cases are frequently being filed against Petitioners and similarly situated employee defendants who should enjoy immunity under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933(i) [the "Act" or the "LHWCA"].

Second, contrary to Respondents' representations, the issue presented is ripe for review. The evidence at trial established that each of these Respondents, and each of these Petitioners, enjoy the protection of the LHWCA. Furthermore, the issue of whether the Act applied to these workers was never contested by Respondents. Rather, Respondents merely argued that the Louisiana state law overrode the federally-granted immunity.

Finally, the direct conflict among the courts was not brought to this Court's attention in the Petition for Writ of Certiorari in *Logan v. Louisiana Dry Dock*, 541 So.2d 182 (La.), *cert. dismissed*, 492 U.S. 939 (1989). Moreover, since the denial of certiorari in *Logan*, other jurisdictions — the federal fifth and third circuits — have considered the issue and deepened the split. Thus, this Court's denial of review in *Logan* if anything intensifies the need for review in the case now before the Court.

I. The Passage of Time Has Not Eliminated The Impact Of This Issue.

Because these are latent disease cases, longshore and harbor workers who were exposed to asbestos and other alleged toxins in the 1960s and early 1970s continue to allege recent diagnoses of asbestosis, pleural diseases, and mesothelioma, and continue to sue statutorily immune co-workers such as Petitioners. In the instant case, the Respondents were exposed to asbestos in the 1950s, 1960s, and 1970s, but were not diagnosed with asbestos-related diseases until the early 1990s.

Most importantly, Respondents are fully aware that thousands of these cases against Petitioners and those similarly situated are currently waiting on state court dockets for court dates. Moreover, Respondents also are aware that in this jurisdiction alone, new cases are filed regularly, with similarly situated plaintiffs alleging recent diagnoses of asbestosis and other alleged toxin-related latent diseases against LHWCA-immune co-employees. Thus, the cases now before the Court are not isolated and by no means are the tail-end of the problem.

II. The Question Presented Is Ripe For Review.

Respondents wrongly argue that the preemption issue is not "ripe," based upon the meritless assertion that they are not covered by the LHWCA. This argument is a red herring, and has nothing to do with the doctrine of ripeness. As shown below, Petitioners presented conclusive evidence at trial that Petitioners were covered by the LHWCA–evidence that was not contested by Respondents at that time or thereafter. Moreover, the

opposition offers no legal argument in support of the claim that Respondents are not covered by the LHWCA, and presented no legitimate basis for this Court to conclude that it would be unable to resolve the question presented.

The evidence at trial established that each of the Petitioners and the Respondents are covered by the LHWCA, because each worked at a shipyard situated on the banks of a navigable waterway, the Mississippi River, building or repairing vessels. In fact, Respondents' original petitions stated that each worked at Avondale Shipyards building and repairing vessels.[1] Testimony at trial further established that the shipyard was located on the banks of the Mississippi River. This evidence was before the Court and never disputed. Rather, Respondents simply argued that they could sue the Petitioners despite the LHWCA's grant of immunity.

Based upon these undisputed, if not admitted, facts, Respondents and Petitioners, as a matter of law, have the right to the protections and benefits afforded under the LHWCA. A worker falls under the LHWCA if he meets a "situs" and "status" test. The "situs" requirement of the LHWCA includes workers injured over water as well as those injured on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."[2] Each of the Respondents in this case meet this test, because they worked at Avondale, a facility on the banks of the Mississippi River

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1 *See* Petitioners' Original Brief on Common Issues, p. 13, footnote 52.

2 33 U.S.C. § 903(a) (emphasis added).

that built and repaired ships, as was admitted by their petitions[3] and their trial testimony.

To meet the "status" test, a person must be "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker."[4] Again, the Respondents in this case meet the test because they all were shipbuilders or repairmen.[5] Because Respondents and Petitioners meet the situs and status tests, they fall within the LHWCA's grasp.

III. The Petition for Certiorari in *Logan* Did Not Identify the Conflict Between *Fillinger* and *Poche* on the Issue Presented in this Case.

Respondents' argument that this Petition should be denied because this Court previously denied certiorari in *Logan v. Louisiana Dry Dock*, 541 So.2d 182 (La.), *cert. dismissed*, 492 U.S. 939 (1989), is likewise unpersuasive; the *Logan* Court was never presented with and never addressed the conflict among the courts on this issue evidenced by the Alabama Supreme Court decision in *Fillinger v. Foster,* 448 So.2d 321 (Ala. 1984), *cert. denied*, 469 U.S. 872 (1984), and the Louisiana Supreme Court decision in *Poche v. Avondale Shipyards, Inc.,* 339 So.2d 1212 (La. 1976). Moreover, denials of petitions for writs of

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[3] *See* Petitions, 00-CA-344, Vol. 1, p. 2; 00-CA-345, Vol. 1., p. 2; 00-CA-346, Vol. 1, p. 2; 00-CA-347, Vol. 1, p. 2; 00-CA-348, Vol. 1, pp. 2, 86-88, 00-CA-349, Vol. 1, pp. 2, 32-36; 00-CA-350, Vol. 1, pp. 2, 32-36; 00-CA-351, Vol. 1, pp. 2, 26; 00-CA-352, Vol. 1, p. 3.

[4] 33 U.S.C. § 902(3) (emphasis added).

[5] *See* footnote 3, *supra*.

certiorari are not substantive decisions. In addition, the split of authority on this issue at that time was not as developed as it is today. Since *Logan*, the federal Third and Fifth Circuits have also considered the issue and concluded that the federal law here should preempt the state law. *Peter v. Hess Oil*, 903 F.2d 935 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 504 U.S. 913 (1993).[6] Thus, this expanded conflict among the courts warrants review in this case.

IV. Conclusion.

In conclusion, the Court should grant this Petition for a Writ of Certiorari to address the conflict and reinstate the federal LHWCA immunity. These Petitioners and others similarly situated continue to be named as defendants in latent disease personal-injury lawsuits brought by co-employees, in defiance of their rights to immunity under the LHWCA. Additionally, Petitioners met their burden of proof at trial, demonstrating by admitted or uncontested facts that as a matter of law Petitioners and Respondents alike are entitled to the rights and benefits granted by the LHWCA. Finally, this Court's denial of the Petition for Writ of Certiorari in *Logan v. Louisiana Dry Dock* should not persuade the Court to deny this Petition, because the issue was not fully presented in that case, and the split in authority at that time was new and immature. As a result, this Court should not be influenced by Respondents' opposition, but should grant the Petition to redress the

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[6] Respondents argue in footnote 3 that the Fifth Circuit's opinion in *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, does not address the LHWCA. However, it does address the preemption of state law by federal law in the maritime arena.

disparate application of the LHWCA in different jurisdictions, which has been reaffirmed by the lower court's denial of LHWCA immunity to Petitioners, and to prevent the same result in the thousands of pending cases.

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